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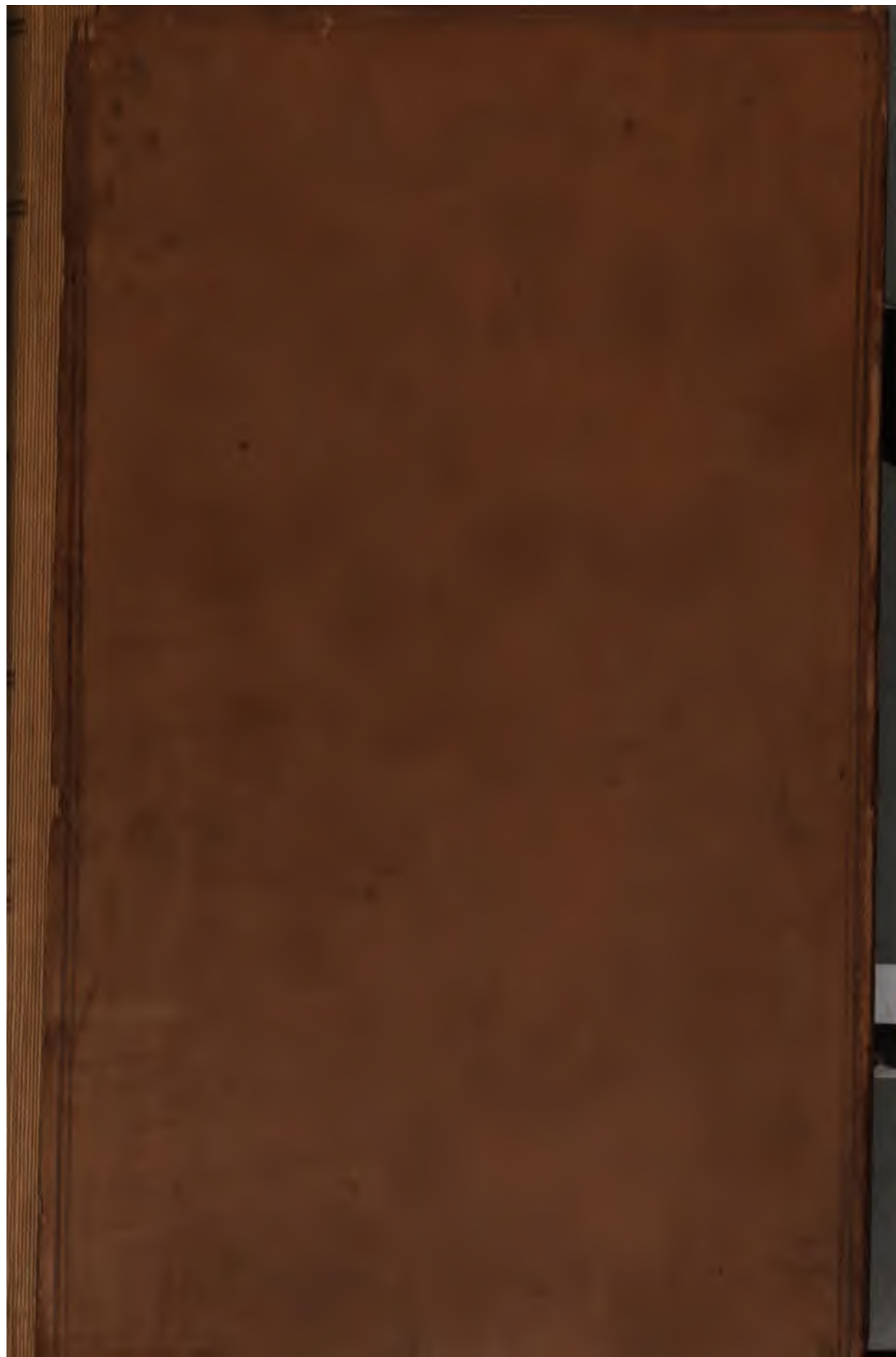
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NEW
REPORTS
OF
Cases
HEARD IN
THE HOUSE OF LORDS,
ON
APPEALS AND WRITS OF ERROR;
AND DECIDED
DURING THE SESSION
1827-8.

By RICHARD BLIGH, Esq.
BARRISTER AT LAW.

VOL. I.

LONDON:
SAUNDERS AND BENNING, LAW BOOKSELLERS,
(SUCCESSORS TO JOSEPH BUTTERWORTH AND SON,)
43, FLEET STREET.

1829.

GUNNELL AND SHEARMAN, SALISBURY SQUARE.

P R E F A C E.

WHEN the Editor announces a New Series of Reports, it may be asked by the Profession why he discontinued the old Series? why the publication has been so tardy? and why he has left it incomplete? To those who are privileged to put these questions, he answers, that intense labour, without encouragement or profit, is not usually exercised with delight or followed up with perseverance. Praise for the compilation of these Reports has been liberally bestowed upon their Author, but solid recompence has been wanting; and the demands of the Profession would exceed the bounds of reason, if they required or expected of an Editor, who has devoted eighteen years of attendance to the collection of Notes in the Supreme Judicial Tribunal, that he should publish those Notes for the benefit of the Profession, not only with a sacrifice of that age of fruitless labour, but at his own personal risk

of loss, which is the present condition of the Publication. These few, out of many assignable reasons, will shew that the slow progress and the actual discontinuance of the Old Series of the Reports was not the effect of mere indolence or caprice.

How then will the Editor account for the appearance of a New Series of a publication under such auspices? He will not attempt it. He can only remind the objector, that habit is the tyrant of the mind; that even despair does not quit without reluctance a post long occupied with hope; that there is some unseen link of undefinable attachment binding the labourer to the ungrateful soil on which his best years have been wasted—which arrests and fetters the person in despite of the judgment: if it should be called by the unfriendly name of infatuation, it might be difficult to find a defence against the charge.

Upon the question of the merits and demerits of the occupation to which the Editor has sacrificed more than half the average period of life, he has stated all that the limits of a Preface admit in that which is prefixed to the

former series of the Reports. He has there also assigned his reasons for the suspension of the Publication through the first eight years, during which he was attending the House of Lords as a collector of notes.

With respect to this new Series, it is proper to inform the Profession of an alteration which has taken place in the plan of the Publication. The body and substance of the work will consist of English and Irish cases. The Scotch cases, or such of them as deserve the attention of the Profession in England, will be shortly abstracted in an Appendix. Originally it was the Editor's intention, in order to form a perfect Record of Cases in the House of Lords, to notice every appeal and writ of error; even those which are brought obviously for mere delay. The execution of that purpose, to a certain extent, will be seen in the volume which now issues from the press. Whether this plan will be pursued in the succeeding volumes, or upon what plan (if continued) the work will be carried on, must depend upon future events and the suffrages of the Profession.

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HEARD IN THE

HOUSE OF LORDS,

UPON APPEALS AND WRITS OF ERROR,

And decided during the Session, 1826-1827.

7th & 8th GEO. IV.

ENGLAND.

(COURT OF CHANCERY.)

BETWEEN

HENRY JOHN LORD SELSEY and others, *Appellants*;

AND

THOMAS RHOADES - - - - - *Respondent*.

In 1804, *A*, tenant for life under a settlement with a power to grant leases for twenty-one years, concurred with *B*, the next tenant for life in an agreement to grant to the steward and solicitor of *A*, a lease of part of the lands, &c. in settlement for twenty-one years absolute at a rent fixed upon a valuation, which omitted to estimate certain rights of common annexed to the lands, on the alleged ground that those rights were disputed by the copyholders of the manor. In 1809, *B*, having become tenant for life, on the death of *A*, executed a lease, according to the agreement.

In 1810, under an Act for inclosure of waste lands, a very large allotment of the waste was made, in respect of the lands leased, the rights of common having been admitted. *B* died in 1816, when the reversion of the lands, subject to the lease, vested in *C*, who accepted the rent reserved till 1821, when he filed a bill to set aside the lease.

Held in the Court below, that the transaction was unimpeachable on the ground of fraud. On appeal, *held* that the

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relief was barred by acts of confirmation and acquiescence ; but whether considering the facts and the relation of the parties the lease might not have been avoided, on the ground of fraud (or *mistake*), if the persons interested had questioned the lease recently after the transaction—*Quære : semb. affirm.*

THIS was an appeal * against a decree of the Vice Chancellor, dismissing a bill filed by the Appellants, as personal representatives of James Lord Selsey, and by H. J. Lord Selsey, in his own right, as remainder-man under a settlement to set aside a lease granted by James Lord Selsey and Mr. Peachy his son, to the Respondent, he being at the time steward and solicitor of James Lord Selsey.

The bill stated that the Respondent was employed by James Lord Selsey, and afterwards by John Lord Selsey, his son, as steward and receiver of their lands, and also as solicitor or law agent; that, in the course of such employment, he became intimately acquainted with their farms and the rights attached to them; and being so, that he prevailed on James Lord Selsey and Mr. Peachy, his son, (afterwards John Lord Selsey,) to concur in signing an agreement for granting to him a lease for twenty-one years of a farm called Amberley Castle, promising that it should be fairly valued; that a valuation was afterwards made by a Mr. Eager, who fixed the rent to be paid, allowing certain deductions, at a sum of 330*l.* per annum, at which rent a lease was accordingly granted; that the farm was then subject to a lease having two years to run, on the expiration of which the Respondent entered, and James Lord Selsey having died, a lease was granted by John Lord Selsey, according to the agreement, for the residue of the term; that James and John Lords Selsey were suc-

* See the Report in the Court below, 2 Sim. & Stu. p. 41.

cessively tenants for life, with a power, under a settlement, of granting leases for twenty-one years, on the usual conditions; that the Appellant H. J. Lord Selsey became entitled, on the death of his father John Lord Selsey, to the premises in question, for term of life, with remainders over, upon such limitations that the whole interest, subject to trusts for issue, vested in the Appellants, who were also the personal representatives of James and John Lords Selsey.

The bill then stated, as facts recently discovered; that a proposal had been made to the Respondent, by the executors of the former tenant, to give 500*l.* a year for Amberley Castle Farm, which was refused by the Respondent, on a false allegation that the farm was disposed of, and that he falsely represented to his employers that such offer was made merely from a sense of disappointment; that upon an inclosure of waste lands in Amberley, under an Act, passed in 1810, four hundred acres of land were allotted to Amberley Castle Farm, a considerable part of which was made in lieu of rights of common appurtenant to the farm; that these rights of common had been altogether omitted by Mr. Eager, in his valuation.

The bill farther alleged, that the Respondent took advantage of his confidential situation, and obtained the lease by misrepresentation, and upon a false valuation of the land; that the agreement for the lease was obtained so long before the expiration of the subsisting lease, for the purpose of preventing competition; that the term of twenty-one years absolute was contrary to the usual mode of letting the land; that the Respondent did not inform Lord Selsey of the offer of 500*l.* a year for the farm; that he knew of the rights of common, and that they

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were valuable and extensive, and were not included in the valuation; that the tithes of the farm were not valued by Mr. Eager, according to the number of acres, which the Respondent knew, and did not inform James or John Lord Selsey of the fact; that in 1818, upon application of the Appellant H. J. Lord Selsey to be furnished with particulars of the lands comprising his estates, the Respondent described the lands held by him, under the lease, as consisting of five hundred acres, knowing at the time, from plans in his possession, that such lands comprised more than eight hundred acres.

The bill further charged that the rent was inadequate, and prayed that the lease might be declared fraudulent and void, and that the Respondent might be charged with a fair occupation rent, during the period of his possession.

In his answer to this bill, the Respondent stated, that the former tenant of the farm having died without children, there was no tenant having a preference; that he applied, in Sept. 1803, to have the lease for a son under age of infirm health, and with a view that he should have a term of fourteen years from the time of his coming of age; that Mr. Eager was chosen by the lessors to survey the farm, and did not know who was to be the tenant, at the time of his valuation; that there were undisputed rights of common attached to certain small portions of the lands, and claims to right of common over extensive wastes, which were disputed by the copyholders of the manor, who exercised or claimed rights of common, without stint, over all the wastes; that these claims and rights as well as the tithe lands, were considered and estimated by the surveyor in his valuation, and the lessors were fully informed of all the

circumstances of the farm; that the trustees under the will of the former tenant, offered to James Lord Selsey 500*l.* per annum for the farm, upon a renewal of the lease, but that they knew, at the time of the offer, that the lessor was bound by the agreement with the Respondent; that James Lord Selsey questioned Mr. Eager as to the difference between his valuation and this offer, and was satisfied that the offer was not made *bonâ fide*, and was no proof of the real value; that the Respondent nevertheless offered to give up the agreement for a lease, and have the farm revalued, which offer was declined by James Lord Selsey, who declared he was satisfied with the valuation of Mr. Eager, and continued to employ him as a valuer; that the Respondent had expended large sums in the improvement and stocking of the farm; that the first proposal for inclosure, in 1805, was abandoned in consequence of the opposition of James Lord Selsey and the Respondent, who thought it would not be beneficial to Amberley Farm; that in 1810, upon a renewed proposal of inclosure, a discussion took place as to the right of common, which, after much difficulty, was admitted by the copyholders to be in the Lord, and two hundred and eighty-six acres were allotted in respect of the lands held under the lease; that the Respondent expended large sums of money in the cultivation of the allotments, being open down, rough and unproductive lands; that James Lord Selsey died in 1808, and John Lord Selsey, who succeeded him, executed the lease, in 1809, according to the agreement, and died in 1816; that both James and John Lords Selsey lived in the neighbourhood of the farm, and were active and attentive to their interests; that the Appellant succeeding to John Lord Selsey, in 1816,

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inspected the property, acted upon the lease, and accepted the rent reserved until 1821, when differences arose between him and the Respondent upon other subjects.

The points made by the answer were generally sustained by the depositions in the cause, and some of the passages of the answer being read by the Plaintiffs, on the hearing of the cause, became evidence for the Defendant; but it appeared that the rights of common were not noticed by Mr. Eager in his valuation, and he deposed in chief and upon cross examination, that it is usual to mention in the return (valuation) rights of common, when valuable, but not when they are insignificant or small in comparison with the value of the farm. Upon cross examination, he further deposed, that he omitted to specify the rights of common in his valuation, because he was informed by Joseph Foster (the bailiff of the farm) and other persons in the parish of Amberley, that the common rights were but of little value, inasmuch as the commons were stocked and eaten up by persons, many of whom had *no right whatever*. In his deposition to one of the interrogatories, he said he had reason to believe, that in the year 1805, John Lord Selsey was aware that some common rights belonged to Amberley Castle Farm; but whether or not he knew *the extent or particulars* of such common rights he could not say.

Joseph Florance, a surveyor, deposed; that the rights of common claimed for Amberley Castle Farm, were disputed by the copyholders, but that upon a discussion, at a meeting before the commissioners of inclosure, the copyholders were advised by their solicitor, that Amberley Castle Farm had gained a right to share in the commons, according to the value of the

farm. The encroachments on the common by strangers, and the dispute as to the right of Amberley Castle Farm, were proved by other witnesses. An agreement, between John Lord Selsey, the Respondents, and others, as to the costs of inclosure, and the proportions in which they were to be borne by the several parties, was produced, and it was proved that John Lord Selsey and the Respondent acted upon that agreement. Various accounts between James and John Lords Selsey and the Appellant H. J. Lord Selsey, containing entries as to the expenses of the inclosures, were also produced and proved. With respect to the offer made by the representatives of the former tenant, before the expiration of the lease, the evidence was contradictory as to the circumstances. Some points, not distinctly put in issue by the bill, were introduced, on behalf of the Plaintiff, on the hearing, particularly whether the lease was not void, as exceeding the power, but that was considered (if put in issue) to be a question at law.

The Vice Chancellor, upon argument of the case, was of opinion, that the principal having been fully informed of all the circumstances under which the lease was granted, it was valid, although the lessee was his agent and solicitor, inasmuch as no rule of equity prevented a lord from granting a lease of land to his steward, from motives of bounty, or from mixed motives of bounty and a money consideration, provided the principal had all the information necessary to enable him to measure the extent of his bounty. With respect to the omission of the rights of common, in the valuation of Mr. Eager, he was of opinion that the Respondent, having no other means of knowledge than Mr. Eager, the valuer chosen by

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Lord Selsey, could not be chargeable with fraudulent suppression so as to affect the lease; and by the decree the bill was dismissed, with costs. Against this decree the Appeal was presented.

The case was argued for the Appellants by
Mr. Horne and Mr. Sugden.

For the Respondents by
Mr. Heath and Mr. Pepys.

26th Feb. 1827. The *Lord Chancellor*.—I have looked into this case, with a desire to affect the lease; for the situation of the parties was such as to induce a Court of Equity to look at the transaction with great suspicion. If the suit had been instituted recently after the contract, and there had been no acts of confirmation, probably the lease might not have stood; but James Lord Selsey and John Lord Selsey acquiesced so long, being well acquainted with the facts, that it is difficult to say that they could have impeached the lease, and the Appellant *H. J. Lord Selsey* cannot do that which they could not have done. We cannot set aside the lease, upon the grounds stated in the pleadings. There is a ground upon which the lease might have been set aside; but the parties have not gone upon that ground, and we cannot set aside the lease upon grounds on which they did not proceed. This is not a case for costs of the appeal. I should not have given costs in the Court below.

26th Feb. 1827.—Decree affirmed, without costs.

COURT OF CHANCERY, ENGLAND.

1827.

WALKER
and others
v.The WARDEN
and FELLOWS
of Christ Col-
lege, &c.

THOMAS WALKER, THOMAS ANDREW }
the Younger, and GEORGE ANDREW } *Appellants.*

The WARDEN and FELLOWS of the }
College of Christ, in Manchester, }
in the County of Lancaster, and } *Respondents.*
WILLIAM JOULE - - - - - }

The Members of a corporation having filed an original bill in their individual names, but stating their corporate character, upon an abatement of their suit, file a bill of revivor in their corporate name only. A demurrer for want of privity between the plaintiffs in the original bill and the bill of revivor was overruled in the Court below and on appeal.

THE Respondents, by the description of the Reverend Thomas Blackburne, Doctor of Laws, Warden of the College of Christ, in Manchester, in the county of Lancaster, founded by King Charles the First; the Reverend James Bayley, clerk; the Reverend John Griffith, clerk; the Reverend John Gatliff, clerk; and the Reverend Charles Wickstead Ethelston, clerk; the Fellows of the said College, and also the said William Joule, on the 24th day of April, 1806, filed their bill in Chancery against Thomas Jepson, Thomas Dewsbury, Thomas Foster, James Dean, Thomas Roberts, Samuel Taylor, John Cheetham the elder, Thomas Andrew, Thomas Walker, and Margaret Chorlton, stating that the said

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Thomas Blackburne was in and prior to the year one thousand eight hundred and four, and had ever since been, and then was the Warden of the said College, and the said James Bayley, John Griffith, John Gatliff, and Charles Wickstead Ethelston, were in and prior to the said year one thousand eight hundred and four, and had ever since been, and then were all the Fellows of the said College, and were as such, Warden and Fellows, in and prior to the said year one thousand eight hundred and four, and still were seized or lawfully entitled to them and their successors, Warden and Fellows of the same College of or to the Rectory of Manchester in the county of Lancaster, and that they or their lessee or lessees were in and prior to the year one thousand eight hundred and four, and had ever since been, and then were lawfully entitled to all the tithes, both great and small, arising within the parish of Manchester aforesaid, and the titheable places thereof, and to all Easter offerings, and other dues which became due and payable from the several inhabitants of the said parish of Manchester, and the titheable places thereof. That the said Thomas Blackburne, James Bayley, John Griffith, John Gatliff, and Charles Wickstead Ethelston, as Warden and Fellows of the said College by an indenture duly executed under the common seal of the said College dated 25th December, 1804, and made between the said Warden and Fellows of the one part, and the said William Joule of the other part, did in consideration of the rent and the performance of the covenants therein mentioned, demise, grant, and set unto the said William Joule, his executors, administrators, and assigns, all and singular the tithes, both great and small, together with the offerings

usually called Easter offerings, and other offerings, oblations, mortuaries, and all other customary dues and payments arising or to arise, or become due or payable to the said Warden and Fellows, or their successors, during the term thereby demised, from any person or persons whomsoever, occupiers of lands or premises, or inhabitants within the twenty-three townships, precincts, or hamlets therein mentioned, and every of them, and of and from all and every the messuages, tenements, lands and hereditaments, situate within the said several townships, precincts or hamlets, in the said parish of Manchester, or otherwise in respect thereof, to have, receive, take, and enjoy the same, unto the said William Joule, his executors, administrators, and assigns, from the date thereof, for and during the term of twenty-one years thence next ensuing, paying, therefore, during the said term, unto the said Warden and Fellows of the said College, and their successors Warden and Fellows of the said College, the yearly rent therein mentioned; That a counter-part of the said lease was duly executed by the said William Joule, and he by virtue of the said indenture became, and had ever since the said 25th day of December, 1804, been entitled to all the tithes, both great and small, arising within the several townships, precincts and hamlets, in the said parish of Manchester, mentioned in the said lease, in kind, and such tithes, and all Easter offerings, and other dues and emoluments, arising, or becoming payable from the inhabitants or others within the said townships, or the titheable places thereof, ought to have been paid and answered to the said William Joule accordingly. That the said Thomas Jepson, Thomas Dewsbury, Thomas Foster, James Dean, Thomas

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Roberts, Samuel Taylor, John Cheetham, Thomas Andrew, Thomas Walker, and Margaret Chorlton, had, ever since the said 25th day of December, 1804, occupied farms and lands within the said townships, or some of them, and in the said year 1805, previous to the separation of the said tithes, had had notice given by or on behalf of the said William Joule, to set out, yield, and pay unto him, the said William Joule, who would take the same in kind, the tithes of the several titheable matters arising and growing upon their farms and lands respectively, but which they had declined to do or to pay, or make him, the said William Joule, any satisfaction for the same, and for the said Easter offerings and other dues, and praying that the said Thomas Jepson, Thomas Dewsbury, Thomas Foster, James Dean, Thomas Roberts, Samuel Taylor, John Cheetham, Thomas Andrew, Thomas Walker, and Margaret Chorlton, might set forth the particular quantities and values of the said tithes, and might account with the said William Joule, or with the Plaintiffs in the said cause, for the single value of the said tithes, and the said Easter offerings and other dues, and might be decreed to pay to him or them, what should appear to be due or owing to him or them from the Defendants respectively on the taking of the said accounts, and for further relief.

To this bill Thomas Jepson, Thomas Dewsbury, Thomas Foster, James Dean, Thomas Roberts, Samuel Taylor, John Cheetham, Thomas Andrew, Thomas Walker, and Margaret Chorlton, appeared and put in their answers, and replication having been filed, a great number of witnesses were examined, as well on the part of the Plaintiffs as of the Defendants, and the cause afterwards came on to be

heard before Sir William Grant, then Master of the Rolls, who on the 3d day of August, 1810, pronounced a decree therein, dismissing the bill as to some of the tithes claimed, and directing issues as to others.

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Against this decree, the Defendants presented a petition to rehear the cause, and the same was accordingly reheard, and on the 10th day of August, 1813, affirmed.

From the decree so affirmed, the Defendants appealed to the Lord Chancellor, and the Plaintiffs in the cause also appealed against some parts of the decree, which appeals were afterwards heard by the Lord Chancellor, who made an order thereon, dated the 25th day of June, 1816, partly reversing and partly affirming the decree.

Subsequent to the date of the last mentioned order, the suit abated by the deaths of the Defendants, Thomas Andrew, Samuel Taylor, and Thomas Walker, whereupon the Respondents not describing themselves individually but suing in their corporate character only as the Warden and Fellows of the College, and William Joule, on the 27th day of November, 1823, filed their bill of revivor and supplement against Thomas Walker, as the administrator of the said Thomas Walker deceased; against Thomas Hutchinson, George Hutchinson, and Edmund Yates, as the executors of Samuel Taylor, and against Thomas Andrew the younger, George Andrew, and Littlewood Andrew, as the executors of Thomas Andrew, praying that the suit and proceedings might be revived, and that the Plaintiffs in the bill of revivor and supplement, might have the same relief against the Defendants thereto, as the last mentioned Plaintiffs were entitled to against Thomas Walker deceased, Thomas Andrew,

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and Samuel Taylor, at the respective times of their death, and requiring the Defendants to the bill of revivor and supplement, to admit assets of the several persons to whom they were respectively representatives, to answer the demands made against them in the suit. To this bill of revivor and supplement all the Defendants thereto demurred, and for cause alleged, that it did not appear by the bill that the complainants, the Warden and Fellows of the College of Christ, in Manchester, in the County of Lancaster, founded by King Charles the First, were entitled to have the suit, and proceedings in the bill of revivor mentioned, revived against the Defendants thereto, or any of them, or to have any relief in the said Court against them, or any of them, and for that the Reverend Thomas Blackburn, the Rev. James Bayley, clerk; the Reverend John Griffith, clerk; the Reverend John Gatliff, clerk; and the Reverend Charles Wickstead Ethelston, clerk; five of the complainants named in the original bill of complaint in the said bill of revivor mentioned, and who all appeared by the said bill of revivor, to have been, and to be parties interested in the said suit and proceedings, were not, nor was any of them parties, or a party to the bill of revivor.

The Demurrer having been argued before the Lord Chancellor, by an order dated on the 5th day of February, 1824, was over-ruled. From this order Thomas Walker, Thomas Andrew the younger, and George Andrew, appealed to the House of Lords.

For the Appellants it was argued, that the original bill was filed by certain plaintiffs in their individual capacity, seeking relief on the subject of the rights mentioned in the original bill, and the bill purporting to be a bill of revivor, is a bill filed by the

Respondent, William Joule, and the Respondents the Warden and Fellows of the College, who are a body corporate, and according to the practice and principles of a Court of Equity, there is no such privity of character or title between the individuals who are the Plaintiffs in the original suit or any of them; and the body corporate as will entitle the body corporate to revive the original suit; that Blackburn, Bayley, Griffith, Gatliff, and Ethelston, Plaintiffs in the original bill, who by the bill of revivor appear to have been and to be parties interested in the suit and proceedings, are not parties to the bill of revivor.

For the Respondents it was argued, that the original bill was filed on the behalf of the Warden and Fellows of the College of Christ, in Manchester, who are a corporate body, and of William Joule their lessee; and although the names of the then Warden and Fellows are inserted in the said bill, yet it is evident that the bill was not filed by the then Warden and Fellows as individuals, but in their corporate capacity; that it was not necessary to have inserted the names of the then Warden and Fellows in the original bill, and that it was not necessary to insert the names of the Warden and Fellows in the bill of revivor and supplement.

That the Plaintiff, William Joule, as lessee of the Warden and Fellows of the said College, would have been entitled alone, and without the Warden and Fellows, to have filed the bill of revivor and supplement against the Defendants thereto.

For the Appellants:—*Mr. Hart, Mr. Duckworth.*

For the Respondents:—*Mr. Agar, Mr. Parken.*

On the 26th of February, the Lord Chancellor, in

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moving the judgment, said that the naming of individuals while the proceeding purports to be in the corporate character and the corporate names are added, is mere surplusage; that the appeal was apparently brought for delay, and therefore costs should be given, but as the Respondents introduced the surplusage on the record that the costs should be moderate.

Decree affirmed, with 50*l.* costs.

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ENGLAND.

(ON AN APPEAL FROM THE HIGH COURT OF CHANCERY.)

THE BAILIFFS, BURGESSES, and COMMONALTY, of the Town or Borough of LUDLOW, in the County of Salop, and the Right Honourable EDWARD EARL OF POWIS, } *Appellants,*

RICHARD GREENHOUSE, (since deceased) JOHN COLEMAN, JOHN HICKMAN, RICHARD GARDNER, ROBERT TENCH, RICHARD TAYLOR, JOHN STEPHENS, and EDWARD POWELL, } *Respondents.*

A. having purchased an ancient chapel with a parcel of ground adjoining, devises it by a will dated in 1590, together with certain messuages, &c., in trust to complete the building of certain almshouses which he had commenced on the ground near the chapel, and to apply the rents of the messuages, &c., to the support of four poor people, with directions for keeping up the chapel and appointing a minister, chiefly for the benefit of the almshouses; but partly also for any other persons who might think fit to attend the service. In 1769, the chapel having fallen into decay, is conveyed, together with the piece of ground, the almshouses, and the messuages, &c., by the heir of the surviving trustee to the Corporation of Ludlow, who in 1771 pull down the chapel, convert the materials to other purposes, and grant leases of the piece of ground near the chapel, upon which houses are built.

Held (reversing the decision of the inferior court), that this is not a case within the jurisdiction of the court under the enactments of the 52 Geo. III., c. 101.

The operation of the Act is confined to the simple cases of a clear breach of trust.

In cases of breach of trust, courts of equity may decree an account of all the profits made; but (*Semb.*) they cannot award damages, (i. e.) compensation for damage done to the trust property.

The Attorney General having signed and allowed a petition under the Act, is at liberty to appear for the Respondents to argue their case.

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A person cannot present or join in a petition of appeal, although he may have an interest in the question, unless he was (or represents) a party in the matter in the Court below.

There cannot be a *prospective* order to pay costs, as of proceedings *to be had* before the Master. The question as to such costs ought always to be reserved.

CHARLES FOXE, being seized to him and his heirs of an ancient Chapel called Saint Leonard's Chapel, standing without the walls of the town of Ludlow, and of a piece of ground near the chapel, and other hereditaments, by his will, bearing date the 12th day of October, 1590, expressed himself in relation to the said chapel of Saint Leonard, Alms-houses, and premises, in these words:—(*viz.*)

“Whereas I have lately began a foundation to
 “erect four almshouses or chambers upon a parcel
 “of ground near the chapel of Saint Leonard, in
 “Corve-street, in Ludlow, in the said County of
 “Salop, which ground, together with the said chapel,
 “I lately purchased to me and mine heirs, of one
 “for the relief and main-
 “tenance of four poor and impotent persons to be
 “there from time to time kept and relieved; my will,
 “intent and meaning is, that if I shall happen to de-
 “cease out of this mortal life at any time before
 “the said almshouses be thoroughly finished and
 “erected, then mine executors, with so much of the
 “rents, issues, revenues, and profits of my mort-
 “gaged lands and the sums of money thereupon and
 “in redemption thereof due, shall build up and finish
 “the same in as short time as conveniently they
 “may, according to the plot or foundation there al-
 “ready begun, and for and towards the relief and
 “maintenance of the said four poor persons, as also
 “for divine service to be had and maintained, as shall

" be hereafter appointed within the said chapel of
 " Saint Leonard. I do give and bequeath unto Ed-
 " ward Foxe, my brother, and Edmund Foxe, my son,
 " two of the executors of my last will and testament
 " and to their heirs and assigns for ever, all those
 " four messuages or burgages, and all lands, tene-
 " ments, and hereditaments, with their appurte-
 " nances, &c. in the city of Worcester and suburbs
 " thereof, &c. being now of the rent or value of
 " 8*l.* by the year; upon condition and to the end
 " that the said Edward and Edmund or their heirs
 " shall within the space of three years next after my
 " decease (if in my life time the same be not to those
 " uses by me conveyed and assured) by their suffi-
 " cient deed lawfully and duly executed *enfeoff some*
 " *three, four or more of my next name and kindred of*
 " *my body descending*; and in default of them some
 " others with them and their heirs, of and in the
 " said messuages, lands, tenements, rents, rever-
 " sions, and hereditaments in Worcester afore-
 " said, and suburbs thereof; to the uses and in-
 " tents hereinafter limited and appointed—viz.,
 " That he or they to whom such feoffment shall be
 " made, *and their heirs*, shall stand seized of the
 " same lands, tenements, and hereditaments, and
 " out of the rents, issues, and profits thereof from
 " time to time shall yearly pay unto the said four
 " poor or impotent persons for the time being that
 " shall be placed or allowed in the said new hospital
 " or almshouse, 4*l.* to be equally divided between
 " them quarterly in four terms or times in the year;
 " and moreover, shall yearly pay unto the curate or
 " chaplain of Ludlow for the time being, or to some
 " other sufficient chaplain or minister, to read and
 " say to the poor there divine service at certain times

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"in the week, as shall be appointed, 40s., and shall
 "also pay and give yearly unto some sufficient and
 "learned preacher, for a sermon to be made and
 "preached in the said Chapel of Saint Leonard's
 "yearly, at some convenient time within the feast
 "of Christmas, 6s. 8d., and other 6s. 8d. for a like
 "sermon to be made and preached in the said cha-
 "pel yearly in the time of Lent, for the better edifying
 "and instructing of the said poor and such other
 "people as shall then resort thither. And touching the
 "residue of the said rents of the premises shall re-
 "main and be employed as and for the necessary
 "repairing the said almshouses and chapel of Saint
 "Leonard's from time to time, as need and occasion
 "shall require; and for levying and gathering the
 "said rents yearly and other necessary charges. And
 "that the said feoffees *and their heirs* and the sur-
 "vivors and survivor of them shall yearly make
 "account unto the churchwardens of Bromfield,
 "how the profits and revenues thereof have been
 "defrayed, and what surplusage remaineth to pay
 "and deliver unto the churchwardens of Brom-
 "field aforesaid, and their order to be taken how the
 "said surplus if any be shall be employed and be-
 "stowed, by the advice of the Vicar of Bromfield
 "aforesaid for the time being. And I give also two
 "bells which I have in my sollar at Bromfield, to be
 "hanged up in the steeple of the said chapel to ring
 "into service when any is there said, and there to
 "remain for evermore."

The testator died shortly after the date of this will, leaving Charles Foxe, of Bromfield, his heir at law, and Edward Foxe and Edmund Foxe proved, and took upon themselves the execution of the will.

2d April 1593. "By Indenture of the 2nd April 1593, between

"Edward Foxe and Edmund Foxe (executors of the
 "testator) of the first part, Charles Foxe son and heir
 "at law of the testator, Roger Foxe, Richard Foxe,
 "and Francis Foxe, the three sons of the last named
 "Charles Foxe, of the second part; Edward Foxe
 "and Henry Foxe, younger sons of the testator, of
 "the third part; and Charles Foxe, son and heir ap-
 "parent of Edmund Foxe, of the fourth part. The
 "first-mentioned Edward and Edmund Foxe, in per-
 "formance of the will of the testator, granted, en-
 "feoffed, and confirmed unto the several parties of
 "the second, third, and fourth parts, together with
 "the said burgages in the city of Worcester, all
 "those messuages, lands, and tenements, with the
 "appurtenances, situate in or near Ludlow, near to
 "the chapel of Saint Leonard, in a street there called
 "Corye-street, on which the testator in his life time
 "erected four almshouses, for four poor impotent and
 "needy persons to be therein maintained and re-
 "lieved for ever; and also the said chapel of Saint
 "Leonard, and the land, ground, and soyle of the
 "same messuages, lands, tenements, and chapel,
 "and all other houses, &c. of the said testator, by
 "the testator devised or assured unto his executors
 "for the use benefit and relief of four poor impotent
 "persons, to hold the same unto the several parties
 "thereto of the second, third, and fourth parts, *their*
 "*heirs and assigns for ever*, upon trust nevertheless,
 "that they and the survivors and survivor and his
 "and their heirs should perform, fulfil and accom-
 "plish all and singular the articles, orders, and or-
 "dinances mentioned in the schedule quadripartite
 "indented thereunto annexed, and according to the
 "true intent and meaning of the same, and of the
 "now reciting indenture."—

The articles and ordinances made the 2nd day of 2d April 1593

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April, 1593, by Charles Foxe (the testator's son and heir) and Edward Foxe and Edmund Foxe (the testator's executors) concerning the trust by the heir and executors of the testator reposed in the feoffees, and the yearly issues of the lands and hereditaments, and for the order and government of the almshouses, and of the manner and order of divine service to be had and celebrated in the chapel of Saint Leonard's, contain the following regulations and directions:—

“First we doe order and appoint that when and so often as it shall fortune all the said feoffees execept three, to decease that soe often within six months next after such decease or deceases, the said three survivors of the same feoffees shall by good and sufficient conveyance convey and assure unto the like number of the next of name and kindred of the body of the said Charles Foxe deceased (as the said feoffees soe happening to decease were of) the said lands tenements hereditaments and premises with the appurtenances to have to the use and behoof of the same new feoffees or persons to whom the premises shall be soe conveyed or assured, and of the said surviving feoffees that shall convey and assure the premises and to the heirs and assigns of the said persons conveying and assuring the premises and of the persons to whom the same shall be soe conveyed and assured. Nevertheless upon like trust and confidence as is by these presents hereunto annexed by us reposed touching the premises in the said Edward Foxe the younger and his said feoffees. And that the like order be observed and kept from time to time for ever after by the survivor or survivors of the new feoffees for the time being and of his and their heirs for ever for and concerning the conveying and assuring the premises with the appurtenances to other feoffees

"and to *their heirs* and assigns for ever to their
 "proper uses and behoofes Nevertheless upon like
 "trust and confidence as aforesaid and not other-
 "wise nor upon any other consideration the costs
 "of which said conveyance to be of the premises from
 "time to time hereafter for ever made and done as
 "aforesaid shall be defrayed out of the yearly rents
 "Then wee doe also ordain that there shall be con-
 "tinually for ever hereafter sustained maintained
 "founded and kept within the said messuages
 "mentioned in the said recited indenture soe
 "erected founded and intended, for an almshouse
 "foure poor needy and impotent persons, of the
 "yearly rents issues and profits of the premises as
 "hereafter shall be declared which foure poor per-
 "sons shall be from time to time appointed nomi-
 "nated and placed there by the said Charles Foxe
 "sonne and heir apparent of the said Charles Foxe
 "deceased Edward the elder and the said Edmund
 "or the greater number of them and by the survi-
 "vor of them during their natural lives and the
 "longer liver of them and after the deceases of the
 "said Charles Edward the elder and the said Ed-
 "mund and the survivor of them shall be from time
 "to time afterwards for ever placed nominated and
 "appointed by the *heirs males of the body* of the said
 "Charles Foxe sonne and heir apparent of the said
 "Charles Foxe deceased lawfully begotten and for
 "want of such issue by the *heirs males of the body*
 "of the said Charles Foxe deceased and for want of
 "such issue by the *right heirs* of the said Charles
 "Foxe deceased for ever and which poor persons
 "and every of them shall there dayly serve God de-
 "voutly in holy prayer and divine service and shall
 "repaire unto the said chappell for hearing of the
 "said divine service and sermons and as often as

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“such service or sermons shall be there reade and
 “preached according as hereafter shall be likewise
 “declared and ordained. Then wee ordaine that
 “when and soe often as any of the rooms or places of
 “the said four poore needy and impotent persons
 “shall become void by death or otherwise that then
 “any other poor needy and impotent person of one
 “of the parishes of Bromfield and Ludlow in the
 “county of Salop shall be elected and chosen as
 “aforesaid in the place soe being then void there
 “to continue during his or her life. Item we also
 “ordain that out of the rents issues and profits of
 “the said messuages lands tenements and here-
 “ditaments in Worcester in the said county of
 “Worcester there shall be yearly for ever well and
 “truly paid to the said four poor needy and im-
 “potent persons for the time being four pounds of
 “current English money to be equally divided be-
 “tween them quarterly at four most usual times or
 “feasts in the year. Item wee doe ordayne con-
 “stitute and appoint Humphrey Madoxe Clerk
 “curate of the chappell of Ludford in the county of
 “Hereford to reade say minister and celebrate
 “divine service in the said chappell of St. Leonards
 “to the said poor people and others that shall resort
 “thither and also to exercise the office of a curate
 “or minister there during his natural life as well by
 “ministering of the communion at such convenient
 “times in the year as is commonly used accordinge
 “to the course and usage of the Church of Eng-
 “land also by ministeringe and reading the divine
 “service there every Wednesday and Friday through-
 “out the year in the mornings of the said dayes,
 “and also every Sunday and Feastifull days in the
 “year morning and evening according to the course
 “and usage of the Church of England which order

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“two sermons to be made and preached to the said
 “poor people within the said chappell of Saint
 “Leonards thirteen shillings and four pence (viz.)
 “for each sermon six shillings eight pence of
 “which two sermons one to be preached yearly at
 “some convenient time in the Christmas holydays
 “and the other sermon to be made yearly in the time
 “of Lent for the better edifying and instructing
 “of the said poore persons and such other people
 “as shall then resorte thither the said preacher as
 “also the said curate or chaplain to be nominated
 “and appointed by the said Charles Foxe sonne and
 “heir of the said Charles Foxe deceased, Edward
 “Foxe the elder and Edmund Foxe and Edward
 “Foxe the younger or the greater number of them
 “the survivors of them during their lives and the
 “life of the longer liver of them and after their de-
 “cease to be nominated and appointed by the heirs
 “males of the body of the said Charles Foxe the
 “sonne and heir of the said Charles deceased law-
 “fully begotten and for want of such issue by the
 “heirs males of the body of the said Charles de-
 “ceased and for want of such issue by the right
 “heirs of the said Charles Foxe deceased for ever
 “Item as touching the overplus rest and residue
 “of the rents issues and profits of the premises
 “wee doe ordayne and appointe that the same shall
 “remain and be employed and bestowed and used
 “from time to time for ever, as necessity shall re-
 “quire in and upon the necessary repairacons of
 “the said chappell and almshouses and for the
 “levying receiving and gathering of the said rents
 “issues and profits the receiver of which said rents
 “shall be continually appointed by the overseers
 “and discretion of the said Charles Foxe (sonne and
 “heire at apparent of the said Charles Foxe deceased)

"Edward Foxe the elder Edmond Foxe and Ed-
 "ward Foxe the younger and the survivor of them
 "during their lives and of the longer liver of them
 "and after their deceases and the longer liver of
 "them by the feoffees of the premises for the time
 "being or the greater number of them and that
 "the said feoffees for the time being for ever shall
 "yearly make account thereof to the wardens of the
 "parish church of Bromfield in the county of Salop
 "how and in what manner the said profits rents
 "and revenues shall be from time to time defrayed
 "and employed and bestowed and the surplusage
 "and overplus thereof (if any shall be) to pay and
 "deliver to the said churchwardens for the time being
 "and they together with the vicar of Bromfield for
 "the time being to employ and bestow the same for
 "and towards the increase of the yearly stipends
 "appointed as aforesaid and limited to him that
 "shall be chaplain or minister for the time being
 "of the said chappell of Saint Leonards or other-
 "wise as to the discretion of the said vicar of Brom-
 "field for the time being shall seeme meet and con-
 "venient Item wee doe also further order that if
 "any of the said foure poor people soe placed or to
 "be placed at any time hereafter in the said whs-
 "house or chamber shall disorder or misbehave
 "him or herself in such sorte as is unmeet and un-
 "seemly for such poor distressed persons being soe
 "charitably and well provided for to doe or as to
 "the said parties to whom the nomination election
 "and appointment of them doth belong as aforesaid
 "shall seeme unfitt and inconvenient that then the
 "said parties to whom the said election and nomi-
 "nation of them shall for the time being appertain as
 "aforesaid shall from time to time as neede and occa-
 "sion shall require remove or displace such of the said

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 GREENHOUSE
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 COBURN v. LUTWELL;
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"four poore persone or persones for disordering or
 "misbehaving him her or themselves and from time
 "to time to nominate and appointe and place others
 "in the place of such person or persons so removed
 "or displaced soe as the full number of foure poore
 "persons and noe more may be alwayes there re-
 "tained suctored and maintained with such allow-
 "ances as aforesaid according to the true meaning of
 "these orders herein contained."

8th February,
 1640.

Henry Foxe the surviving trustee named in the
 indenture of the 2d of April, 1593, by indenture,
 dated the 8th of February, 1640, conveyed and as-
 sured the almshouses, messuages, chapel, and pre-
 mises, unto and to the use of Somerset Foxe the
 elder, Edward Foxe, Richard Foxe, John Foxe,
 and Ralph Foxe and Somerset Foxe, of Cainham
 and Henry Foxe, and their heirs and assigns, in trust
 for the charitable uses and purposes in the indenture
 of the 2nd of April, 1593, and the ordinances men-
 tioned:

1st October,
 1684.

Somerset Foxe and Henry Foxe being the sur-
 viving trustees named in the last mentioned inden-
 ture, by indenture of the 1st of October, 1684, made
 between Somerset Foxe and Henry Foxe on the one
 part, and Charles Foxe of Westminster, Chesterton
 Foxe, Henry Foxe of Reteskin, Francis Foxe, Edward
 Foxe, Matthias Foxe, John Foxe, and Charles Foxe
 of Ludlow, of the other part; after reciting the tes-
 tator's will and the indentures and ordinances of the
 2d of April, 1593, and the last mentioned indenture,
 and also reciting that the chapel was then lately re-
 edified at the sole costs of Somerset Foxe (party
 thereto): it was witnessed, and Somerset Foxe and
 Henry Foxe, for the continuance and preservation
 of the charitable work so founded by the testator,
 and for other good and valuable considerations, gave,

granted, enfeoffed, and confirmed the premises unto Charles Foxe, of Westminster, Chesterton, Foxe, Henry Foxe of Reteskin, Francis Foxe, Edward Foxe, Matthias Foxe, John Foxe, and Charles Foxe of Ludlow and the survivor and the heirs and assigns of the survivor for ever; upon trust and confidence that they, and the survivor and the heirs and assigns of such survivor should and would from time to time dispose of the said premises, and employ the rents and profits thereof according to the charitable intention of the testator mentioned and comprised in the articles of the 2d of April, 1593, a copy whereof was unto the now reciting indenture annexed.

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Henry Foxe of Reteskin having survived his co-trustees named in the last mentioned indenture, died about the year 1726, leaving Henry Foxe, then of Leominster, his eldest son and heir at law, who died intestate, leaving James Foxe, his brother, and heir at law.

By a deed of feoffment, dated the 10th day of April 1769, and made between James Foxe, brother and heir of Henry Foxe, and also grandson and heir at law of Henry Foxe of Reteskin, who at his death was the only surviving trustee for the charity, of the one part, and the Bailiffs, &c. of Ludlow, of the other part, after reciting the indenture of the 2d of April 1593, and the articles and ordinances of the same date, the indenture of the 8th day of February 1640, the will of Charles Foxe; and that under the indenture of the 2d of April 1593, the premises at Worcester, almshouses, and chapel of Saint Leonards, became vested in the before-mentioned feoffees, the said Henry Foxe and others, who were since dead, and also reciting the indenture of the 1st day of October 1684; and that all the trustees, named

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in that indenture, had long been dead ; that Henry Foxe, of Reteskin, was the surviving trustee; but died about the year 1726, leaving only two grandchildren, both infants, viz. Henry Foxe, brother to James Foxe, and the said James Foxe party thereto, and the said Henry Foxe and James Foxe, the grandsons of Henry Foxe of Reteskin, being infants at the time of the decease of Henry Foxe, their grandfather, and their own father dying before their grandfather, the said infants were brought up in parts beyond the seas; and the charity during their infancy, became neglected, and the chapel went greatly to decay, as did also the four messuages and burgages, in the city of Worcester; and also reciting, that Henry Foxe, deceased, the brother of James Foxe, party thereto, upon his attaining the age of twenty-one years, and coming into England, and being informed that the said trust was then become vested in him, and that the occupiers of the premises in Worcester (who were in low circumstances) set up a right to the same, caused application to be made to such persons for the possession of the premises, in the city of Worcester; or that they would attorn tenants to him for the use of the charity; which being refused, Henry Foxe caused a suit in ejectment to be brought on his demise in his Majesty's Court of King's Bench, and obtained a verdict upon the trial thereof at Worcester assizes, some time in or about the year 1751; and also, soon afterwards, obtained one other verdict at the assizes held for the county of Salop, for recovering possession of the almshouses or almshouse in Ludlow; and also reciting, that the four houses or burgages, in the city of Worcester, belonging to the charity, and so recovered by

Henry Foxe, being gone so ruinous and decayed, were incapable of repair: and therefore, for the making the best advantage thereof, for the use of the charity, Henry Foxe, granted building leases thereof, at the ground rents, and under the several leases therein more particularly mentioned and described. And also reciting, that the four several messuages, tofts, or burgages, and premises, having been so recovered and demised by Henry Foxe, he from the rents and profits of the same, caused the almshouses, in Ludlow, to be repaired, and paid and maintained four poor needy and indigent women therein, until the day of his death, which happened in or about the month of May 1762; upon whose death the trust, vested in James Foxe, as being the only brother of Henry Foxe, and the only grandson and heir of Henry Foxe of Reteskin, the surviving trustee named in the indenture of release of the 1st day of October 1684; and also reciting, that since the decease of Henry Foxe, brother to James Foxe, the said James Foxe had caused the rents of the houses to be received, and had paid and maintained four poor and indigent women within the almshouses; but the chapel called St. Leonard's chapel, in Ludlow, and near adjoining to the almshouses, was many years before the last named Henry Foxe's coming to England, and had been ever since, in a decayed and ruinous state and condition, and there being then not known to be living any person or persons of the name and kin of Charles Foxe, the testator, whereby to fill up a sufficient number of trustees or feoffees of that family, for the continuing and perpetuating the charity, and James Foxe living remote from the premises, had, on application from the bailiffs and commonalty of the town of Ludlow,

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and on their agreeing to make an order of their council or chambers for affixing their common seal to one part of the now stating indenture, and accepting the trust according to the grant therein made thereof, agreed as far as in him lay, to vest the said chapel, almshouses, and the said messuages or tofts at Worcester and premises, and the trusts thereof, in them the said bailiffs, burgesses, and commonalty, and their successors for ever, upon the trusts and ordinances before mentioned relating to the same, and that the said James Foxe had to the now reciting indenture annexed an account of the receipt and application of the rents and profits of the said premises from the time his brother Henry Foxe recovered the said four messuages or tofts at Worcester as before mentioned to the day of the date thereof, It was witnessed that for continuing and perpetuating of the charitable work founded by Charles Foxe, and for the establishing a sufficient number of trustees and feoffees for performance of the charity, and for other good causes thereunto moving, he the said James Foxe did, as trustee, and as far as he lawfully could give, grant, bargain, sell, infeoff, release, and confirm unto the bailiffs, &c. of Ludlow, and their successors for ever, all the aforesaid messuages, lands, and tenements, with the appurtenances situate near to the chapel of St. Leonard, and also the said chapel of Saint Leonards, and the land, soil, and ground of the same messuages or almshouses, and chapel thereunto belonging, and also all those several messuages and premises, in the city of Worcester, and demised by Henry Foxe, brother of James Foxe, for the use of the charity, in and by the several indentures of lease thereinbefore mentioned, to hold subject to those indentures of lease unto

the bailiffs, &c. and their successors for ever in trust, and to and for the support of the said almshouses and four poor, needy, and indigent persons, to be paid, kept, and maintained therein, from the rents and profits of the said premises according to the original intention of the said charity, such persons to be thereafter nominated and chosen of the parishes of Ludlow and Bromfield, or one of them by the majority of the bailiffs, burgesses, and commonalty for the time being, and for the other charitable uses and purposes set forth in the said recited indentures, articles, and ordinances relating to the said charity; and the bailiffs, burgesses, and commonalty for themselves, and their successors, covenanted and agreed with James Foxe, his heirs, executors, and administrators, that they the bailiffs, burgesses, and commonalty, and their successors, should from time to time for ever thereafter save harmless and indemnify the said James Foxe, his heirs, executors, and administrators, from and against all costs, charges, and damages which should happen or be occasioned to him or them, by means, or on account of his granting or conveying the premises thereby granted or conveyed unto the bailiffs, burgesses, and commonalty, or their successors, on the trusts, and in manner therein mentioned.

Upon this indenture of feoffment livery of seisin was indorsed.

By lease and release dated the 7th and 8th of October 1771, the release being made between James Foxe of the one part, and the bailiffs, burgesses and the commonalty of Ludlow of the other part, reciting the indentures and articles of the 2nd of April 1593, of the 8th of February 1640, and of the 1st of October 1648, it was wit-

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nessed that for continuing and perpetuating the charitable work founded by the testator and for establishing a sufficient number of trustees for the performance of the charity and in consideration of ten shillings James Foxe as trustee and as much as in him lay, granted, released, and confirmed unto the said bailiffs burgesses and commonalty and their successors and assigns for ever the said almshouses chapel and premises by the description therein mentioned, To hold the same unto and to the use of the bailiffs burgesses and commonalty and their successors for ever, In trust for the support of the almshouses and four poor needy and indigent persons to be paid kept and maintained therein from the rents and profits of the premises according to the original intent of the charity, such persons to be thereafter mentioned and chosen of the parishes of Ludlow and Bromfield or one of them by the bailiffs burgesses and commonalty or the major part of them, And for such other charitable uses and purposes set forth in the therein recited articles and ordinances relating to the said charity as were then existing and capable of taking effect;—And the indenture contained a similar covenant on the part of the said corporation to indemnify James Foxe his heirs executors and administrators—and a declaration that James Foxe had deposited with the corporation for safe custody the several indentures articles and ordinances in or by the now reciting indenture mentioned or recited.

On the 8th of July 1815, The Respondents presented their petition to the Lord Chancellor whereby after stating that the testator Charles Foxe was entitled to the chapel, burial ground and almshouses, and

reciting the will of the testator, the indentures and ordinances of the 2d of April 1593, the indenture of the 1st of October 1684, and indentures of lease and release of the 7th and 8th of October 1771, and that the stipend of the minister of the chapel for the time being had been augmented by various other persons who had granted certain endowments thereunto payable for ever and which consisted of an annual payment of one pound out of a certain estate situate in Ludford, an annual payment of one pound out of a certain estate situate in the parish of Ashford Bowdler, the annual sum of fourteen shillings out of certain leasows called chapell leasows, and the annual sum of twelve shillings out of three houses situate in Dinham, which several sums passed to the corporation by the indenture of the 8th of October 1771, and that upon the execution of that indenture the corporation entered upon and took possession of the chapel almshouses and all other the messuages lands and premises belonging to the charity and into the receipt of the rents and profits thereof and had ever since continued to hold the charity premises, but that in the year 1773, the corporation caused the chapel to be pulled down and destroyed contrary to the trusts reposed in them, and without any faculty from the ordinary of the diocese or any other authority for so doing, and that they sold or applied to some other building all the timber and the materials thereof and received the produce arising from such sale amounting to a considerable sum but that they did not apply such produce to the purposes and upon the trusts of the charity, and that soon after such sale the corporation granted a lease of the scite of the chapel and the chapel-yard adjoining to a member of the corpo-

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ration, for a term of ninety-nine years at the low and inadequate rent of 1*l.* 15*s.* per annum, and that since the demolition of the chapel the proprietor of the estate in the parish of Ludford had refused to pay the annual sum of 1*l.* on the ground that there being no chapel existing the rent charge for the minister thereof could not be claimed or demanded, and further stating that during the time when the chapel stood many of the parishioners of the parish of St. Lawrence (in which parish the chapel was situate) used to resort thereto for the purpose of attending divine service and that the ceremony of baptism and burial was frequently performed there, but that since the chapel had been pulled down and the scite thereof and the yard adjoining let, the parishioners had been deprived of the benefit and all opportunity of resorting thereto, and had been prevented from using the chapel yard for the purposes of burials, which was attended with great inconvenience to the parish, as the burying ground belonging to the church of Saint Lawrence (which was the only burying ground in the parish) was infinitely too small for the purposes of burial in the parish, and that the bodies of deceased persons were constantly taken up before they ought to be in order to receive the bodies of others, and that the corporation had constantly elected poor persons of the town of Ludlow to fill up the vacancies which had occurred in the almshouses and had not elected any poor persons from the said parish of Bromfield (except in one instance) since the trusts came under their management, and that the trusts of the charity had been in numerous other instances mismanaged and neglected: and that when the chapel was kept in repair there was an excellent pulpit, and many good

pews therein, and a very large congregation always attended divine service there, and that when the same was going into decay several of the inhabitants of Ludlow were about to make a subscription for the repairs thereof, which was opposed by the Rev. Thomas Rocke, then rector of Ludlow, who stated that he should be deprived of some Easter dues, if the chapel was repaired; the fact being that the rector of Ludlow had a small glebe but chiefly depended for his income on his Easter dues:—and further stating, that at the time when the chapel was pulled down in the year 1773, the bell belonging to it was removed to the market cross of the town of Ludlow, where it had ever since been and then was, and that the timber of the chapel was either wholly or for the most part sold, and part of the timber was used in building the house of one William Felton, of the town of Ludlow, and the stones of the chapel were applied in building a new bridge over the river Corve, in the town, and some of the pews were removed from the chapel to the parish church of the town and placed in the galleries of the church:—and further stating, that the chapel yard had many grave stones in it and was used for a burying ground during many years, and that the chapel when it was pulled down might have been repaired at a small expense, for the side and end walls were of great thickness and quite sound, and that the timbers consisting of the beams, summers, wallplatts and rafters of the roof were also sound and strong, and that the decay was only in the tiling of the roof: that there was only one church in Ludlow which was not sufficient to contain one-fourth of the inhabitants: that two or three families used one pew, and that the church nearest to it was not in the same county:—

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and further stating, that the rents and profits of the trust estates when the leases had expired, would be much more than sufficient to answer all the purposes of the charity, but the corporation had not rendered any account thereof to the vicar or churchwardens of Bromfield, or to any other person, and what they had received they had retained or in some manner misapplied: and that the corporation had omitted and neglected to register the charity and the purposes and trusts thereof in manner directed by an Act of Parliament passed in the fifty-second year of his late Majesty's reign entitled "An Act for the registering and securing of Charitable Donations," as by the Act they were bound to do.

The Respondents by the petition prayed, That it might be referred to one of the Masters of the Court to enquire into the trusts of the charity, and to approve a proper scheme for the due regulation and management thereof, and that the lease of the chapel yard might be ordered to be cancelled, and the yard applied to the purposes of burial, and that an account might be taken of the want of repairs to the chapel, when the same was taken down, and what sum of money would have been sufficient to repair the same, and what sum of money it would now cost to rebuild the chapel upon the same plan and dimensions as the old chapel, and that the corporation might be ordered to account for all the rents and profits of the trust estates received by them or by their order or for their use, and also for the timber, pews, stones and other materials of the chapel converted or disposed of by them and that the amount of what should be found due from the corporation upon taking the accounts might be paid into the hands of the Accountant General of the Court, in trust for the charity, and

that if on taking the accounts the amount should be found insufficient to rebuild the chapel that the corporation might be ordered to pay such further sum of money sufficient to rebuild the chapel, or put the same into the condition it was in at the time when it was taken down, and that proper persons might be appointed feoffees or trustees of the chapel and charity premises ; and that the corporation might be ordered to convey the premises to such new feoffees or trustees upon the trusts of the charity, and that proper directions might be given for registering the charity according to the provisions of the Act of Parliament, and that the corporation might be ordered to produce and leave with one of the Masters of the Court, for safe custody, all the title deeds, papers and writings in their custody or power, and upon the oath of their treasurer, secretary, town clerk or agent, relating to the charity premises.

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This petition having been allowed by the Attorney General, twelve affidavits were filed by the Respondents in support of the allegations of the petition, which came on to be heard on the 17th of November, 1815, before the Vice Chancellor,* when the Appellants the corporation appeared by their counsel and opposed the prayer of the same, having filed nine affidavits in answer to the petitioners' affidavits. After hearing the petition, the Vice Chancellor declared :

“ That the bailiffs, burgesses and commonalty of
“ the borough of Ludlow, had been guilty of a
“ breach of trust in pulling down Saint Leonard's
“ chapel in the said petition mentioned, and con-
“ verting or disposing of the timber, pews, stones,

Order of 17th
Nov. 1815.

* Sir Thos. Plumer. See the Report on the original hearing. 1 Mad. Rep. p. 92. The order was pronounced after Sir T. P. had become Master of the Rolls.

1827. ~~corporation of Ludlow, &c. v. the commonalty of Ludlow, &c. and others.~~ ~~and other materials of the said chapel as stated in the said petition, and did therefore order that the said Corporation be discharged from being feoffees or trustees of the charity estate, and did order that it be referred to Mr. Jekyll, one of the Masters of the Court, to appoint new feoffees or trustees of the charity estate in the room of the corporation, and did order that the bailiffs, burgesses and commonalty of Ludlow, should at their expense convey the charity estate to such new feoffees or trustees and their heirs upon the trusts of the said charity, and they were to declare the trusts thereof accordingly. And his Honor did also order that the said Master should settle such conveyance, and that the said Master should enquire and state to the Court what were the timber, pews, stones, bell and other materials of the said chapel, and the value thereof at the time they were converted or disposed of by the said Corporation, and what had become of the said timber, pews, stones, bell and other materials. And did order that the said Master should also inquire and state to the Court what would be the expense of restoring the chapel and the burial ground belonging thereto into the state in which they were at the time such breach of trust was committed, and for the better discovering of the matters aforesaid the parties were to produce before the Master upon oath all books papers and writings in their custody or power relating thereto; and were to be examined upon interrogatories as the Master should direct, and did order that the corporation should pay unto the petitioners their costs of the said application, and of the proceedings to be then had before the Master~~

"under the same to be taxed by the Master, and
 "after the Master should have made his report,
 "such further order should be made as should be
 "just."

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In July 1816, the corporation presented their petition of appeal to the Lord Chancellor against this order which was heard on the 10th, 11th, and 13th days of August 1821, and on the 12th of September following, the order was affirmed.*

Pending the appeal, various proceedings took place before the Master under the original order of the Master of the Rolls, and several orders were made against which no appeal was presented.

Upon the hearing of the petition of appeal the Lord Chancellor observed that unless the possession of the scite of the chapel were recovered, the chapel could not be restored, and therefore he suggested that an information with the Attorney General's sanction to vacate the lease granted by the Corporation of the chapel, scite and burial ground should be filed which the Respondents undertook forthwith to do, and accordingly on the 13th of February, 1822, the Attorney General at the relation of Francis Hand, Edward George, William Edwards, and Thomas Cadwalladar, (three of whom were the new feoffees of the charity appointed and approved of by the Master under the reference to him) filed an information in Chancery against

* A question was made whether this order of affirmance was absolute and final, or conditional. The minute delivered out by the Lord Chancellor in his own hand writing ran thus:—"Confirm the order of the 17th Nov., 1815, reserving the consideration as to the regularity of the proceedings subsequently had till the next day of petitions; and in the meantime, if the parties mean to file an information, with the Attorney General's sanction, to affect the lease, let the same be filed." E. C. 12th Sept., 1821.

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Richard Gibbon, and Hannah his wife, and other persons representing or claiming under Edward Acton, the original lessee, praying that the lease granted to Edward Acton by the Corporation of Ludlow might be declared a fraud upon the charity, and that the defendants might be compelled to deliver up the lease to be cancelled. To which information two of the defendants (Sarah Acton and Mary Acton) appeared and put in their answer.

The bailiffs, burgesses, and commonalty of Ludlow, appealed to the House of Lords against so much of the order of the 17th of November 1815, as declares,

“ That they have been guilty of a breach of trust
 “ in pulling down and converting and disposing of
 “ the timber, pews, stones, bell and other materials
 “ of the chapel; and as directs that they shall be
 “ discharged from being trustees of the charity
 “ estates, and also against so much thereof as directs
 “ a reference to the Master to appoint new feoffees
 “ or trustees, and also against so much thereof as
 “ directs that the Appellants shall at their expense
 “ convey the charity estates to such new trustees
 “ and their heirs upon the trusts of the charity, and
 “ that the Master should settle such conveyance and
 “ inquire and state to the Court what were the tim-
 “ ber, pews, stones, bell and other materials of the
 “ chapel, and the value thereof at the time they
 “ were converted and disposed of by the Corpora-
 “ tion, and what had become thereof, and to state
 “ what would be the expense of restoring the chapel
 “ and the burial ground into the state in which they
 “ were at the time when such breach of trust was
 “ committed.

“ And also against so much of the order of the

" Lord High Chancellor of the 12th of September;
 " 1821, as confirms the order of the 17th of November;
 " her, 1815."

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For the Appellants,

The *Attorney General* and *Mr. Hart*,

For the Respondents,

Mr. Heald and *Mr. Roupell*,

Before the case was opened an objection was taken on the part of the Respondents, that the Attorney General appearing as Counsel for the Appellants, appeared against his own petition.

Upon this objection, the Lord Chancellor having observed that the Attorney General was no party to the appeal, and although he was a party to the petition which was the foundation of the proceeding, was no party upon the record in the House, proceeded thus:—

It affords me great satisfaction that Mr. Heald should have raised a point which in my opinion calls for the judgment of the House upon this subject, because I think that the judgment of the House, if it shall happen to agree with my opinion upon it, may set right the practice in the Court below, which is entirely at variance with what it was when I had the honour of standing outside that bar; and I think my Noble and Learned Friend* who sits near me now will inform your Lordships what was the practice with respect to the Attorney General's appearance in every proceeding by information, whether it came on before the Chancellor or at the Rolls.

This Act was passed in the 52d year of the late King, and is known by the name of Sir Samuel Romilly's Act; and having myself in this House taken a part

* Lord Redesdale.

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In the passing of that Act, I hope I shall not be thought to speak with any disrespect, which is the last thing in the world I intend to the high character of that individual, when I declare respecting this Act what I believe may be predicted of a great many other Acts introduced by great men, that they have done more harm than good. The interposition of the Attorney General was made necessary by the second clause of the Act, which is in these words:—

“ Provided always, and be it further enacted, That every petition so to be preferred as aforesaid shall be signed by the persons preferring the same in the presence of, and shall be attested by the Solicitor or Attorney concerned for such petitioners, and every such petition shall be submitted to and allowed by his Majesty's Attorney or Solicitor General, and such allowance shall be certified by him before any such petition shall be presented.”

Now if this Act is to be construed otherwise than by the application of those principles which belong to informations, or at least if it is not to be construed in some degree by such an application, it appears to me that the extent of the mischief will be very considerable indeed; that is, if the Attorney General has no right to interpose against that to which he has given his own sanction in the same manner and to the same extent as he can interpose with respect to the proceeding by information.

With respect to those proceedings by information, I have often taken the opportunity of stating, that within my own memory neither Lord Thurlow nor Lord Loughborough would permit a matter to proceed in the Court of Chancery on an information unless they were concerned in the cause, and I have known Lord Loughborough very often get up

and state to the Court, when he was Solicitor General, that neither he nor the Attorney General had been consulted upon a proceeding that was about to take place. I think my noble and learned friend near me will confirm me in that observation to the extent of saying, that even at the Rolls, the Master of the Rolls would never proceed unless there was somebody instructed to appear as Counsel for the Attorney General, not merely for the relator, but for the Attorney General.

Two cases have been mentioned, in which, certainly, I had not the least notion that I was trespassing against the rule of proceeding: *The Attorney General v. the Corporation of Bristol*,* and *the Attorney General v. the Corporation of Exeter*†. In the case of the *Attorney General v. the Corporation of Bristol*, the object of the information was to find out a fund that was to be applied to some purpose, which the Corporation of Bristol were under an obligation to execute by the application of that fund. The information had been filed, and I suppose had been laid before the Attorney General of that day, and had not been very much considered by him: but the matter when it came before the Court appeared to me to be this, that the information had called for a discovery which was to be put upon the Records of the Court of Chancery demanding information with respect to every title, every property, every right, every valuable thing which that corporation had for the then unnecessary

* The case is still depending before the Lord Chancellor, on Appeal from the decision of the Vice Chancellor. The case as it stood before the Vice Chancellor is not reported.

† See the case reported as reheard before Sir T. Plumer, M.R., Jacob's Rep. Vol. I. p. 443.—The case before the Chancellor, as alluded to in the text, is not reported.

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purpose, as it seemed to me, of finding out some fund that might be applied to the purpose for which that information was filed. It had the authority of the Attorney General. He had allowed it by not only putting his name to it, in the case of a petition, but he had allowed it by becoming himself a party to the information, and it did appear to me in that case, as it always appeared to me, that the Attorney General, as representing his Majesty, is bound certainly to take all necessary care of the relators; but, on the other hand, he is equally bound, as representing his Majesty, not to suffer oppression to affect the interest of the defendants, who are equally his Majesty's subjects. I therefore thought myself authorized, and I feel thoroughly convinced that I was right, in calling upon the Attorney General to look into that information, and to inform the Court whether he would abide by the information in that form, or address himself to a correction of it, making it effectual for the plaintiffs without being oppressive to the defendants.

The same principle was applied to the case of the *Corporation of Exeter*. The corporation put in an answer, which, as the answer of a corporation is without oath, had been somewhat slovenly drawn with respect to the date, for which they had submitted to account, and there was a matter of law which it may be necessary to set right at the hearing of the cause. I do not recollect how that is, but it appeared to me a most oppressive thing to call upon the corporation to account for two or three centuries, and that therefore was submitted to the Attorney General's consideration, who has the carriage of the relator's cause, and the duty of taking care of it, but such care is not to be oppressive to the defendants in the suit. It was then found that

all that justice could require, was to cut down that account to a reasonable period, and that a pretty long period.

I believe it will likewise be found that, even after a decree, when the cause came into the Master's office, it was the custom to require express notice to be given to the Attorney General in cases in which it was important that his consideration should be given to the proceeding in those offices.

Then the question is this. Is the allowance of the Attorney General required by the second section of this Act to have an effect which his being a party to the information would not have, and when the Attorney General has once allowed the petition which at the time of approving it he might think right, is it from that moment out of his power to correct his own opinion, though that correction be for the interest of those whose interests he is to protect, recollecting always that he is bound not to permit the plaintiffs in a cause to oppress the defendants in a cause, but to take care that the proceeding is a reasonable, fair, judicial proceeding as between the parties. I submit therefore to your Lordships, and my humble opinion, that there is no objection to hearing the Attorney General in support of this appeal.

Lord Redesdale.—In all cases in which it would be important to substitute summary proceedings instead of the original regular mode of proceeding in courts of justice, this Act ought to be construed as merely intended for the purpose of saving either time or expense. Unquestionably, looking at this Act, it appears to me to be (so far as relates to the concurrence of the Attorney or Solicitor General) which is thrown into the second section of the Act, loosely and incor-

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rectly worded. The preamble of the Act is, that it is expedient to provide a more summary remedy in cases of breaches of trust created for charitable purposes. It was not intended to alter the law upon the subject but merely to provide a more summary remedy. Now why was the Attorney General a party before this Act passed to informations filed for the purpose of carrying into execution any charitable purpose or of remedying any abuse which might exist with respect to the application of funds given for the purposes of charity? The ground stated in all the books is this, that the King is to be considered as the *parens patrie*, that he is the protector of every part of his subjects and that, therefore, it is the duty of his officer, the Attorney General, to see that justice is done to every part of those subjects. It would be highly improper for the Attorney General assisting in that character to pre-harden upon one party than upon another. It is his duty to see that justice is done, and it was for that purpose as I conceive that informations in the name of his Majesty's Attorney General were permitted for the purpose of carrying into execution charitable dispositions, or for providing for the due distribution of charitable funds. Relators were required for this reason, because the crown paid no costs. The Attorney General prosecuting as the officer of the crown could not be liable for costs, and a complaint might be made against individuals highly oppressive to them unless there were some person responsible for the costs that might be incurred in consequence of that proceeding.

I conceive that the intention of this Act, however loosely it may be worded, was simply this, - to substitute a summary proceeding instead of a

more regular proceeding. I have always considered that it was a wise saying, that the farthest way about is often the nearest way home; and I believe that these summary proceedings will be found to be not always the nearest way home, or at least not the best way home. I have an objection, a fixed and rooted objection, to any rash alterations of established laws, because I am thoroughly persuaded that, generally speaking, such alterations lead to mischief. In the first place, they are generally ill understood; they are precipitately undertaken, and loosely expressed; and that which the wisdom of ages has contrived to have clearly described, is confused by the words of an Act of Parliament, often extremely difficult to interpret. The fair way of interpretation of every Act of this description is, in my opinion, to proceed by analogy to that which existed before, and to conceive that Parliament did not intend that any other alteration should be made, than that which it expressly says shall be made. It says that the proceedings, instead of being in the form of an information, shall be by petition, and upon affidavits, or such evidence as shall be produced, to determine the matter; and such order shall be made for costs and other matters, as the Court shall think proper.

If this case had proceeded in the regular ordinary course, by way of information, that information would have stated clearly what that was which the Attorney General thought a fit object of his protection; it would have been limited according to what the Attorney General thought consistent with justice, with respect to the party whom he called upon to account to him. An answer would have been put in: the matter would have thus been put in issue between the parties; and whatever was not

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admitted in the form of an answer, must have been proved by the usual mode of giving evidence in Courts of Equity; the cause would then have come to a hearing, and a decree would have been pronounced upon a view of the whole case. The Attorney General would then have had the control of the whole proceedings; he certainly might, and unquestionably often did refuse to proceed to the extent to which relators would proceed, who might be urged on by animosity and by party considerations, especially against a corporation; and it was his duty to see that justice should be done—that justice should be done, not only to those who were the objects of the charity, but to the trustees of that charity. Many things have lately passed with respect to charities, which have had a very unfortunate effect. I know that a great many persons now refuse to be trustees for charities: they say, we are exposed in such a manner to proceedings against us, that we must beg leave to decline being trustees for a charity; and the effect will be to prevent respectable persons being trustees for charities, if they are to be exposed to the sort of proceeding which unfortunately this Act of Parliament has more than once given rise to.

As long as the law was under the direction of what had been established by practice perhaps more than by any original law upon the subject, but by practice founded on principle, namely the right of the King to protect any part of his subjects, the proceeding was perfectly well understood and regular, and, no doubt, was always under the control of the officers of the Crown. It is true that in this Act, all that the Act in words says is, that his Majesty's Attorney or Solicitor General must allow the

petition. Now what could his Majesty's Attorney or Solicitor General know of the merits of a case of this description, merely from the representation of the persons who bring such a petition into court. They cannot possibly know what may be the answer to the proceedings, and therefore I think the word allowance, which is introduced into this Act of Parliament, cannot be construed to mean that the Attorney General having once allowed a petition, he should never afterwards have any thing to do with the subject. The Act of Parliament does not pretend to subvert the law upon this subject. It only proposes to substitute a summary proceeding instead of a more formal proceeding; and therefore I conceive that the Attorney General must be considered as having a control over any proceeding by petition, as he would over any information.

The looseness with which the Act is framed is evident from these words: "to be approved by his Majesty's Attorney or Solicitor General." Taking that without reference to what was the law previously upon the subject, that would mean that the Solicitor General, without the concurrence of the Attorney General, might approve of these proceedings; but we know very well that according to the previous law the Solicitor General could not file an information except in the vacancy of the office of Attorney General. If there was no Attorney General, the Solicitor General could in the vacancy of the office file an information. But even that was a mooted question, whether in the vacancy of the office of Attorney General the Solicitor General could file an information. The office of Attorney General being vacant, an information was filed in the name of the Solicitor General; but when an

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Attorney General was appointed, under whose control was that information? not of the Solicitor, but of the Attorney General.

When I was early in life practising in the Court of Chancery, I had no idea that any case of an information could proceed without inquiring of the Attorney General, if it was thought fit to set down the cause for expedition at the Rolls, where the Attorney General did not usually attend, what counsel he chose to have a brief delivered to, on behalf of the Attorney General. That question was always asked, and the Attorney General always directed to whom the brief should be given. The person to whom that brief was given stood in the place of Attorney General; and it was as much his duty to see that every thing was done fairly towards the defendants in the case, as toward the charity who were the objects of the information. He considered himself as standing in the place of the Attorney General, and that it was his duty to see that nothing more was done than what justice required.

I conceive, therefore, that the object of this proceeding has been somewhat mistaken if it is supposed that the Attorney General has no right to interfere. I take it that the true meaning of the Act of Parliament is this: merely to give a summary remedy, instead of a more regular proceeding, which in ninety-nine cases out of a hundred will be found to be the best course at last. But it was intended to give this summary proceeding instead of the more formal proceeding, and was not intended in any manner to alter the law upon the subject, or to put the proceeding out of the control of the Attorney General after he had once given his *fiat*. I think, therefore, that the objection must be over-ruled.

After these observations the Attorney General proceeded to argue the case for the Appellants.

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In the course of the argument, the following observations were made by the Lord Chancellor and Lord Redesdale:

1. As to the character and quality of the chapel, and the proceedings with respect to it.

Lord Redesdale.—I do not see that any attention has been paid to the incumbent of the parish. Does it appear at all what the foundation of this chapel was? I ask that question because I suppose there are not less than three or four hundred spots of ground of this description in this country.

It does not appear whether the chapel was dissolved by the Act of Edward the 6th. That is extremely material; because if it was dissolved by the Act of Edward the 6th, it was desecrated by that Act, and it remained no longer a consecrated chapel; and if it was not subsequently consecrated, I apprehend that no person could, strictly speaking, do what is required to be done in that chapel.

It would have been easy to trace the title to the chapel, because being vested in the Crown it must have been granted by the Crown, and that grant of the Crown would have traced it to the individual to whom it was granted.

The ordinances are very material in one point of view, because they treat this completely as a private chapel to which the trustees had a right to appoint the chaplain, who was merely a private chaplain. Those trustees could have no right to appoint a curate to perform duty in a chapel that was to be the chapel of the parish. It might be lawful for them to have a private chapel for the use of

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those poor people in the almshouse, but that is a very different thing from having a chapel for the use of a parish. When a chapel is for the use of a parish, I apprehend no person can appoint a curate to it without the consent of the minister of the parish, whoever he is. Is there any evidence that this was a parochial chapel?

The *Master of the Rolls* was of opinion that the inhabitants were bound to contribute.

The question of its having been a parochial chapel must depend upon the records in the Bishop's Court; it would have been the duty of the Archdeacon to have reported it at the time when the corporation took possession of it. That would all appear upon the record.

The witness noticed in the proceedings is not a competent witness as to the chapel, because he claimed a right to sit there.

The *Lord Chancellor*.—The real character and nature of this chapel does not appear to have been inquired into. With respect to this being a parochial chapel there is no evidence, the order does not say so. I apprehend there are many chapels, the nature of which it is difficult to state, but having been annexed to schools and almshouses, they cannot be considered as desecrated to the extent that they may be turned into playhouses. There are hundreds of chapels not parochial chapels annexed to colleges and other institutions, that could not be so converted.

2. As to parties.

The *Lord Chancellor*.—Unless it can be shown that this is a parochial chapel in the strict sense of those words, what interest have the parishioners in

this deed? Do the petitioners state themselves to be parishioners?

In the papers, the churchwardens of Bromfield* are mentioned, but I do not observe that the character is given to them in the petition.

Lord Redesdale.—The right heirs of Charles Foxe were necessary parties to the proceeding, because they have the right to nominate and appoint the minister.

In the petition they state that the nomination is in the heirs male of Charles Foxe, with a view, I suppose, to the allegation, that all the heirs male are dead. By the ordinances, it is vested in the right heirs of Charles Foxe.

The person who made the conveyance to the corporation was the last heir of the trustee, but not of Charles Foxe.

3. As to the breach of trust.

The Lord Chancellor.—The agreement entered into with the corporation was a breach of trust, because the corporation undertook by that to indemnify the person, the heir male, against the effect of it—and to be sure, that was a most improper creation of a trust. They could not take the property otherwise than subject to the trusts. The transaction in 1774 was a breach of trust. Suppose this deed of trust executed in 1771, and the pulling down and the selling of the property had happened in the same year. Could the act be held consistent with that trust deed. If there had been any other trustees accepting the trust, what have they to do in destroying the trust, because other persons may not accede to a due execution of it.

* To whom the surplus, after repairs, was to go.

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The order of the Vice Chancellor takes no notice of other parts of this petition, which state conduct that certainly may be wrong if truly stated; such as payments out of the charity fund on account of pulling down the chapel.

Lord Redesdale.—The conveyance to the corporation was a breach of trust, and therefore it is that they indemnify the person who conveys from the consequences. The existence of a burial ground is contrary to the terms of the trust, because whatever was not assigned for gardens for the poor people in the almshouses was to be occupied by the minister.

4. As to the jurisdiction and the form of the proceedings.

The Lord Chancellor.—If I remember right, in the Court of Chancery it was thought they could grant no extension of the Act. If that could be done we should be quite ready to admit that there was a jurisdiction; one question is, therefore, whether the Court has jurisdiction? I am glad to see an appeal to the House of Lords to have the point settled. If the House should be of opinion that the jurisdiction does not extend to such cases as this, it may be necessary to have a short Act of Parliament to confirm orders made upon petition which ought to have been made upon bill.

Suppose this had been an information instead of a petition, what could the Court have done with an information two and twenty years after the act committed?

* See the Attorney General v. the Brewers' Company. 1 Meriv. 495, where Grant, Master of the Rolls, said, "It was a point not decided from what period a corporate body should be obliged to account in matters of trust." The decree was in 1816, and the

If the proceeding had been in 1771, before they began to pull down this chapel, for an injunction to prevent their pulling it down, the Court would have granted that injunction.

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The order of the Vice Chancellor of 1815 did not necessarily lead to charging the Appellants with any thing beyond the value of the property, the value of which he directed to be inquired into: subsequently he goes a great deal further. But supposing this matter to have come on in the year 1774 instead of the period in which the cause came on in the Vice Chancellor's Court, it would have been a question whether the value of those materials might have been charged against the Corporation as far as they would go in restoring the walls of that chapel.

Supposing the original order to be right, and supposing the confirmatory order to be right, there is nothing in either of those orders that would justify 1220*l.* being demanded necessarily; that would be a question when the Master's report came before the Court. The question upon that report would be not whether the 1220*l.* was to be paid, but whether so much of the 1220*l.* as was the value of the materials was to be paid, for there is nothing in either of those orders that necessarily concludes that the whole expense is to be paid; if it turned out upon inquiry, as it might have turned out, that the value of the materials was equal to restoring the chapel to the state in which it was; whether, according to law, the corporation ought to be charged with something in the form of damages ultra what they have received, that is a question quite open.

Lord Redesdale.—Is there any case in which the account was directed from 1779. The authority of this case was adopted by Sir Thomas Plumer in the Attorney General v. the Mayor of Exeter, ante, page 45.

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Court of Chancery has awarded damages for a breach of trust. Lord Keeper Coventry was of opinion that he could not. In the case of a chapel of which I am trustee, Lord Coventry declared that where there was a gross breach of trust, all he could do was to make the persons who had committed it account for all the profits they had made, though the thing had received considerable damage.

The Lord Chancellor.—The Vice-Chancellor, in the first instance, before there were any proceedings in the Master's office, orders the costs of those proceedings in the Master's office to be paid by the other parties. He does not suspend the order for the costs of the proceedings till an opportunity was had of judging by knowing what the proceedings were, and then deciding which party should pay. When that note* of mine was delivered, I conceive that it was my intention that that order should be drawn up with a reservation of the question of the regularity of the proceedings. How is it that order is drawn up, supposing it to be my opinion that the whole of the order should be confirmed? When the order was drawn up, it ought not to have been an order for the confirmation of the whole of the Vice-Chancellor's order, but expressly reserving that part which relates to the regularity of the proceedings which were subsequently had.

The order of 1815 has given the costs of the subsequent proceedings, of which they complained in their petition of appeal.

With respect to that part of the original order which gave costs in the Master's office, undoubtedly when that order was confirmed there ought to have been a saying of that part of the order.

* The minute of the order. See ante, p. 41.

"The House cannot take any notice of the minute," because the minute is not the order of the Court; there is the order of the Court; which whether it be right or wrong is not drawn up according to the minute. And it is upon that order only that this House can proceed.

The order might have been rectified upon rehearing, according to the minute.

Lord Redesdale.—If the order was not drawn as it ought to have been by the Register, an application should have been made to the Court to amend the order. If the officer of the Court, in discharging his duty, did it erroneously, if he drew up the order different from the directions given by the Court, your application should have been personally against the Register, for drawing up a wrong order.

The Lord Chancellor.—A question would have arisen upon the argument upon the Master's report, supposing there was the breach of trust complained of in this form, whether the Court would be justified in ordering any thing more to be repaid than what was the value of the old timber and other materials. Or if the Court thought it could not order the restoration of the chapel at a greater expense, whether this Corporation was to be visited in damages. If there had been a proceeding right in its nature, proper in its jurisdiction, and all the proper parties brought in at the time, nobody can deny that the Corporation must have been answerable for the materials.

With respect to any orders but those two appealed against, we have nothing whatever to do. If those two orders are confirmed, whether any others are to stand this House cannot decide, because they are

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* See ante, p. 41.

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not appealed from; if those orders are reversed, then they fall without any order at all.

If the value of the timber and materials was equal to the expense, by incurring which the whole was to be restored, the Court would have been justified in directing that value to be so applied.

At the conclusion of the argument, the following observations were made by :

The Lord Chancellor.—I rise for the purpose of protesting against its being understood that we have any thing to do with the various transactions stated upon the appeal and the printed cases, in the first place with respect to the report of 20 December 1817, the order of the 13th of June 1818, the Report of the 6th of February 1819, and the order of confirmation, bearing date the 22d of February 1819, or the order of the 26th of June 1822, or the 30th of July 1822. The appeal being only against the order of 1815 and part of the order of 1821, it appears to me that a great deal of the argument with respect to what is the law by which you are to charge a Corporation arising out of the other orders, is quite out of the case; because there is no appeal against any of those proceedings. If those proceedings fall to the ground by the reversal of the order of 1815 and the order of 1821, then there is no occasion to say any thing about them. If, on the other hand, these orders do not fall to the ground by reason of that reversal, the consequence is that they must be dealt with as they can be dealt with elsewhere; for there is no appeal against them here. The case therefore must be necessarily confined to the question, are the orders of 1815 and 1821 right or wrong? And that question embraces so many

important considerations, that you will have enough to do in confining the subject of the appeal to that question, and not travelling out of it.

Lord Redesdale.—This Appeal comes before your Lordships upon a proceeding under the authority of an Act of Parliament which was probably intended for the furtherance of justice, but which undoubtedly, as it appears upon this proceeding, seems only to have tended to increase expense, and answer no useful purpose.

That Act of Parliament was calculated to supply a more summary mode of proceeding, instead of the established mode of proceeding with respect to charities. In the reign of Queen Elizabeth, an Act was passed which is commonly called the Statute of Charitable Uses, and that Act authorized the issuing of certain commissions to inquire in respect of what are called charitable uses and trusts. That Act authorized the Court of Chancery to issue commissions directed to certain persons; of those persons, one was to be the bishop of the diocese, with other persons selected for the purpose, and they were authorized to proceed by summoning a jury of the county where the property in question was situated for the purpose of inquiring whether there had been any abuse or misapplication, or mistaken application of the funds belonging to the charity. Several proceedings were had under that Act, and a long train of decisions by the commissioners is reported in a book called "Duke's Law of Charitable Uses." Of those proceedings many were not very consonant to justice: those proceedings, however, were subject to review by the Lord Chancellor, many of them were reviewed, and when

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reviewed, they were found so puzzling, that at least not obtaining the ends of justice by an easier mode of proceeding, that I believe a commission has not been issued for a great number of years, it having been found to be much more convenient to return to the old mode of proceeding by information by the Attorney General, bringing the matter in question formally upon record, stating the claims that were made upon individuals charged with a breach of trust, calling upon those individuals to make a defence, and putting their defence upon record, and then having a complete issue upon the record, upon which the judgment of the Court of Chancery might be formed.

And Commissions for charitable uses having thus fallen into disuse, partly by their abuse (and whoever reads the proceedings under them must see there was frequently great abuse) and partly because they were found insufficient in prosecuting the claim in many instances, and also from being extremely unjust, in many instances, as to the persons called upon to account for property, or the persons sought to be charged by means of those commissions, the proceeding for many years past, has been by information in the name of the Attorney General. Those informations were necessarily under his control, and it was the duty of the Attorney General to see that they were not improperly exhibited. Unfortunately, I believe, the Attorney General has not always been selected from among persons in the habits of business in the Court of Chancery, and it sometimes happens that informations of this description have been inadvertently signed by the persons holding the office of Attorney General. By the Reports of *Atty. Gen.* and *Peery* you will find that Lord Hardwick frequently

found fault with the proceedings of that description. In some cases he dismissed the informations, and ordered the relators to pay the costs, hinting that the Attorney General had not used sufficient caution upon the subject. I mention this, because in the course of the proceeding an objection was taken to the Attorney General appearing in the appeal against the proceeding which has been had for what was supposed to be a furtherance of the charity. I apprehend it was the duty of the Attorney General to interfere. I do not say exactly in the manner in which he interfered in this case, because I think the Attorney General ought to have stopped the proceeding in an earlier stage of the business, for it is impossible to look at these proceedings without perceiving that the Act has done what could not be the intent of the framers of the Act, under the authority of which it proceeded; it has done that which Lord Hardwick frequently reprehended; it has produced great expense without any possible adequate good. The Act of Parliament is entitled "An Act to provide a summary remedy in cases of abuses of the trusts created for charitable purposes." If the intent had been to supersede the prior law on the subject, the Act would have been so expressed; but it seems to me it cannot possibly be so intended; indeed, I should say that almost in every case it was not a positive Act. Hence it is, "Whereas it is expedient to provide a more summary remedy in cases of breaches of trust created for charitable purposes, as well as for the just and upright administration of the same; Be it therefore enacted, &c." The preamble seems to me to import, that it is applicable to those cases only in which upon complaint made by petition in this way, the Court of Chancery could see the whole of the

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proceedings which they were called upon to institute, and all that ought to be done by them in consequence. The Act does not create what one might properly call a new jurisdiction, but it gives the liberty to proceed upon the old jurisdiction in a summary way in certain cases; it certainly does not provide for a variety of cases relating to charitable uses and trusts; it cannot possibly therefore extend to all: it must be considered as referring to certain particular cases. The Act says, that this proceeding shall be "by petition to the Lord Chancellor, the Lord Keeper, or Lords Commissioners for the Custody of the Great Seal, and to the Master of the Rolls for the time being, or to the Court of Exchequer, stating such complaint and praying such relief as the nature of the case may require."

Now, although adverting to the subject in question, the Attorney General might have a choice, perhaps, in which Court he would sue; it does not seem to me that this Act, in that enactment, has been very attentive to what was the established jurisdiction either of the Court of Chancery or the Court of Exchequer in this matter. But it then provides, "That every petition so to be preferred as aforesaid shall be signed by the persons preferring the same in the presence of, and shall be attested by, the Solicitor or Attorney concerned for such petitioners and every such petition shall be submitted to and be allowed by his Majesty's Attorney or Solicitor General and such allowance shall be certified by him before any such petition shall be presented."

I cannot conceive that it was the intention of the framer of that Act merely that the Attorney General should sign his allowance to this as a matter of course, or the Solicitor General: for under this Act

parties are told that they may proceed either by the Attorney or Solicitor General; but it has been determined that the Solicitor General is no officer of the Crown for such a purpose; while there is an Attorney General, his office is subordinate, and therefore it cannot have been the intention of the legislature that a practice of that kind should be altered by Acts of Parliament framed sometimes by persons ignorant of the subject to which they apply, which cannot be said in this case, supposing the framer of the Act to have held the office of Solicitor General, he must have known that his office of Solicitor General was subordinate to that of the Attorney General. Having provided that it does not go on to say the subsequent proceedings shall at all be under the control of the Attorney General, but surely it must be so intended. Can it be imagined that the Attorney General was merely to put his *allegatur* to this petition and then it was to proceed without any further control on his part? That would not be at all analogous to a proceeding by information, because, whenever the proceeding is by information in the common and ordinary way, the Attorney General is in every part of the proceeding, though the Attorney General does not always act personally. If he happens to not in the Court of Chancery before the Lord Chancellor, of course he is the person who appears as counsel in it, the information. It is in the course of business to send a brief to him upon the subject, but if the proceeding is heard at the Rolls, where the Attorney General does not always attend, I believe he never interferes there, then the counsel I have always understood was to apply to the Attorney General, to know to whom he chose the brief should be deliv-

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vered for the purpose of conducting a cause of this description, and even in a case where the Attorney General is made defendant, which he may be in order to protect the charity, the Attorney General always prepares an answer for that purpose, by the hands of a person who acts as his assistant; every Attorney General names the person who is to be his assistant in the Court of Chancery, and the Court of Exchequer also, for revenue purposes.

This being the nature of the Act to which I have referred, I think it must be intended by the legislature that it should apply only to the simple cases mentioned in the preamble; that is, the simple case where there was a breach of trust, and where there was no question with respect to the persons interested in that trust, or in what manner that breach of trust was to be acted upon in a case where the assistance of the Court was necessary for the purpose of directing in what manner the charity funds, which did not appear to have been clearly defined by the person who founded the charity, should be disposed of. Wherever the disposition in favour of a charity clearly points out in what manner the funds are to be disposed of, there is no authority or right to interfere; and the Court never does interfere ordinarily, if it appears clearly how the funds of the charity are to be disposed of. Where the case goes further, and there is a clear breach of trust, and where persons are interested against whom no breach of trust can be alleged, and therefore who cannot be brought before the Court of Chancery upon proceeding of this description, because they are not in the words of the Act; upon such a case as that I conceive it is impossible that this power can properly apply. It also cannot

apply to any case where the matter of inquiry does not relate to a breach of trust, but where matters are to be inquired of which are of a totally different description.

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Viewing this case with this impression of what is to be considered as the true construction of the Act, I must refer to the subject of these proceedings; and here I must again observe upon the inconvenience of this mode: if an information is filed, that information would regularly form the ground of the whole proceeding; it would bring before the House the ground of complaint, who were the persons interested in the subject, and bring before the Court by name all the persons so interested; and these persons called upon by information to make their defence, would have an opportunity by their answer of stating whatever they thought fit upon the subject to the Court. But what are the matters put in issue between the parties by this summary mode of proceeding: there is, properly speaking, no issue joined between the parties, it is all *ex parte*, and a great deal of the confusion that has arisen in this case has been produced by that circumstance.

The petition states the grounds of complaint; and to these grounds of complaint there is not, in the regular form of proceeding, any answer, because there could not be any; and that is a proper ground for considering this Act as an Act of very confined operation.

The petition stated, that this was a gift of a very ancient date, by a gentleman of the name of Charles Foxe, which Mr. Foxe made a will, dated so long ago as the 12th of October 1590, considerably above 200 years ago. In that will he provided thus:

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“Whereas I have lately begun a foundation to erect
“four almshouses or chambers upon a parcel of
“ground near the chapel of St. Leonard in Corfe-
“street in Ludlow in the said county of Salop which
“ground together with the said chapel I lately
“purchased to me and mine heirs of one
“for the relief and maintenance of four
“poor and impotent persons to be there from time
“to time kept and relieved.” Now the will recites
that the ground and site of this chapel had been
purchased of an individual; it was consequently
therefore, according to the title appearing upon this
will, conveyed in fee, and it seems most probable,
from all that appears, to have been one of those
charities which either by the statute of Henry the
8th, or the 1st of Edward the 6th, were dissolved
and vested in the Crown, under the apprehension of
their being otherwise applied to what were called
superstitious uses; that is, for the purpose of main-
taining what were called superstitious ceremonies
under what were called the corruptions of the church
of Rome prior to the Reformation. Many of these
cases appear in the Reports, where sums of money
were given for the purpose of burning tapers to par-
ticular images, and other superstitious purposes. The
funds given for these superstitious uses were vested
in the Crown as forfeited, by the misapplication of
them to a purpose considered improper. This pro-
bably was the nature of this chapel, and being a
chapel which had been instituted for one of these
purposes, it was thought fit by Parliament to put an
end to it. Perhaps chapels of this description, many
of them, could have become, if they had been suf-
fered to remain, chapels of ease to parishes; that
would have been a great accommodation to the

inhabitants living near those places; but in the progress of the Reformation (we must allow there was a little violence in the proceedings) they were all swept away. Perhaps one reason for that was, that the counsellors and advisers of Henry the 8th and Edward the 6th were rather desirous of obtaining some of these lands, which they did in great plenty. The ancestor of the present Lord Petre was then Secretary of State, and he got a very large grant of that description; and Queen Mary, wishing to restore them to their original purpose, took them from him. This chapel was probably of that description. But whatever it was, the persons who preferred this proceeding have never thought it worth their while to inquire. Now if this had been a proceeding by information, I apprehend the Attorney General, or the person whom he deputed for that purpose to look into the proceedings, would have desired to know what this chapel was; he would have said, "If I am to file an information for the purpose of having this chapel rebuilt, which is the object of these proceedings, I must desire to know for what purposes it is to be rebuilt. I must desire to know what it was, and some inquiry must be made on the subject—and I have very little doubt that a little diligence would have found out the origin. It must have been derived from a grant by the Crown; there was nothing to do but to search the calendar of Patents from the Crown previous to 1590, and probably a grant would have been found, for it must have been from the Crown, and they would then have known whether it was possible to be applied to the purposes for which they sought to have it applied."

The persons who present this petition are inhabit-

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ants of Ludlow, who insist by their petition that this is a chapel which ought to be maintained for their convenience; so far it is a question of the personal interest they have in the subject; and they ought to have informed themselves upon the subject before they went to the extent of filing this petition, praying that this chapel might be appropriated to the uses to which they desire it to be appropriated; for they state expressly they had a right to have it applied to the uses of a parochial chapel.

For the purpose of deciding whether they have a right to this relief or not, there are other persons to be consulted. In the first place, the incumbent of the parish of Ludlow was to be consulted. I doubt whether the person who made this will was not aware of this, for he directs that the curate of Ludlow shall be the person who shall serve this chapel. I have been unable to find out (though I have looked into Mr. Bacon's book for the purpose) what sort of a living the incumbent of Ludlow has; I do not know whether he is a rector or curate or what. I think he is a curate only, and that there is not in Ludlow an ecclesiastical rector; there may be a lay rector or vicar, but no ecclesiastical rector, or if so, I apprehend he has no tithes, because this proceeding states that he had nothing for his maintenance but a small glebe, and the rest of his maintenance consists of his fees for marriages, baptisms, and so on. If he has nothing for his maintenance but this small glebe and those fees, he was importantly interested in these proceedings, for he had a right to contend that no burials, baptisms or marriages should take place in that chapel and that a chaplain should not be appointed. I am not clear whether his Majesty's Attorney General (as I under-

stand now* the appointment of the rector of Ludlow is in the Lord Chancellor, in right of the crown) ought not to be a person appearing for his Majesty's own interests. It seems to me, therefore, that when we consider this case throughout, with respect to the rights of the person who may be rector, or whatever he is called, in Ludlow, (and I cannot help thinking, that although he may be now called rector, that at the time of this bill, he was called curate, because I have known cases of that kind, where a curacy of this description has been transformed into a rectory, by the presentation to the rectory, and so altered in the books,) the person who penned this will evidently conceived there was an interest of some description in the person having the ecclesiastical office in Ludlow, which would be interfered with by the purposes for which he built the chapel.

If it was not a chapel authorised by law, at the time when this will was made, directing it to be applied to the purposes mentioned in the will, the will could not lawfully direct it to be so applied, but it might still be applied, according to the doctrine which is often laid down in cases in Duke's Law of Charitable Uses, to another description of charity. However, the claim upon this proceeding is, that it should be applied to this as a parochial chapel. It is impossible under a summary proceeding of this description, for the Court of Chancery to limit its application in that way, because there are not persons before the court capable of sustaining a proceeding of that description. The will then directs that a further proceeding shall be had after his death, for the purpose of completing certain

* The Lord Chancellor had said that he believed he had once or twice made a spiritual rector of Ludlow.

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almshouses he meant to be built, and which formed the first object of his consideration; and also the carrying into execution the rest of the directions in his will, the appointment of people and so on for the almshouses.

After his death a deed was executed for this purpose, in which very complete directions are given with respect to this charity, in conformity with his will. So far directions were not necessary for the purpose of this chapel; those directions apply to the almshouses and the persons to be appointed. That is not the object of this proceeding by petition; that has been totally lost sight of; the almshouses and the people in the almshouses have never been thought of in this proceeding; the minds of the persons engaged in this proceeding were solely confined to this chapel for the convenience of certain persons in Ludlow. Now in the view of the original testator Charles Foxe, and in the view of the person who after his death proceeded, according to the directions of his will, to carry it into effect, the almshouses were the principal object of their consideration, and they appropriated this chapel more with a view to the attendance of the people in the almshouses, than the accommodation of any other persons who might live in the neighbourhood, and who probably, as the parish church of Ludlow is not so convenient to many of the inhabitants as this chapel, would have attended it; in the proceeding upon this petition of appeal, the attention of the court has been directed to the chapel, and nothing else.

The deed which was executed in pursuance of the direction in the will of the original testator Charles Foxe, prescribes the manner in which the charity

shall be afterwards managed; it provides also for the manner in which new trustees shall be appointed, and it directs that those shall be nominated first of all by the heirs male of Charles Foxe; and if there are no heirs male, then by the heirs general. An inquiry has been made upon these proceedings, whether any such heirs existed; and this has introduced into this proceeding something which appears to be extraordinary. Lord Powis asserts that he is, in right of Lady Powis, entitled to name the trustees of this charity, and entitled also to present to the almshouse and chapel, and therefore he has put himself in as an Appellant with the Corporation of Ludlow. Now he is no party, and therefore, I apprehend, that the appeal, as to him, ought never to have been received, and if the House had attended to the circumstances, the petition of Lord Powis, as an Appellant, ought to have been instantly rejected, as being a person who had no right to appeal; with respect to him, therefore, I apprehend that the appeal must be dismissed as having been improperly received.

With respect to the bailiffs, burgesses and commonalty of Ludlow, they certainly are persons interested in what has been done in the court below, and they have a right to complain of it. It is not possible, upon a proceeding such as this is, in the court below, that any thing can be done effectually for the purposes of this chapel, if it is such as has been represented, because it is impossible, upon that summary proceeding, to make any order effectually upon the subject. This has been found, as I understand, already upon one part of the case, viz. the ground which was the site of this chapel, has been granted for the purpose of a building lease, and is

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built upon, and in order to erect this chapel, those buildings must be removed, and there must be a proceeding calculated to effect that object against the person in possession of this ground, as lessee, in whom the legal estate appears to have been vested, by the demise which has been made to him, under the circumstances of this case, for the purpose of removing him from that ground, in order to enable the Court to direct that this chapel should be re-erected, if by law it can be used for the purposes mentioned in these proceedings. It has therefore after all been found necessary, as I understand, that an information should be exhibited for that purpose. Now that circumstance alone shows, that this application was improperly made to the Court, in the first instance, by way of summary petition. The object of the act of parliament was to save expense, to make it a more easy and less expensive mode of proceeding, to bring before the Court the abuse or any misapplication of a charity; but if there must be also a proceeding by information, of what use is this summary application. It is often found that attempts to introduce more summary proceedings lead only to greater inconvenience and greater expense; the ordinary and regular proceedings in Courts of Justice are carried on in a way with which all the persons who practise in those Courts are familiar: they proceed regularly in a course which puts in issue all matters that ought to be put in issue, and enables the Court to judge in what manner finally to dispose of such a proceeding. Upon this summary mode of proceeding, calculated it is said to save expense, the taxed costs of the persons who present this petition under the orders pronounced upon that subject (I do not

mean to say your Lordships have anything to do with it, because there are proceedings subsequent to those complained of in this Appeal, but I mention it merely for illustration, that the expense very nearly amount to 300*l.* upon one appeal, including the costs of the other party, and after all there is an information, which information might have included the whole of this case, and brought the expense into one suit, instead of dividing it into two. The proceeding, therefore, instead of saving expense, has created a very considerable additional expense.

But this is not all. I apprehend that the information which has been filed will not do unless they have brought before the Court other persons than are brought before it upon this petition; for in that proceeding, if it is merely a proceeding to vacate the lease and to have the property restored, I presume the Corporation of Ludlow must be parties, and there must be other parties to the proceedings, because if this cannot be restored for the purpose for which it was intended to be applied, what is to be done? Is the Court to direct the chapel to be built for no purpose? Certainly not; that would not be an advantageous application of the funds of this charity, the original object of which was the establishment of almshouses. The Corporation of Ludlow have acted certainly most unadvisedly in this business, and in consequence of having so acted they have got themselves into a great difficulty. It seems to me, that in this case, when this petition came before the Vice Chancellor, he thought that all he had to do was to make them pay for having so acted; for he not only directed the Corporation of Ludlow to pay the costs of the original proceedings, but he directed them to pay the costs of all the pro-

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ceedings before the Master, however vexatious and improper those proceedings might be; although it is usual, I apprehend, in such cases to reserve the consideration of those costs until it shall appear what has been done. That is a little of the rage that belongs to this sort of proceeding; but he seems never to have thought of the almshouses. Now, what is the object of those relators who are named in this petition as being of the parish of Bromfield—what is their subject of complaint? Their subject of complaint is, that in the appointment of persons to those almshouses the Corporation of Ludlow have with a natural sort of predilection preferred the people of Ludlow to the people of Bromfield; and though the people of Bromfield were entitled as much as the people of Ludlow to have their neighbours appointed to the almshouses, the Corporation of Ludlow had thought of their own people only. There was a pretty good ground of complaint on the part of the inhabitants of Bromfield, yet this petition seems to have been silent upon that point; and the Corporation of Ludlow having neglected their friends at Bromfield, the Vice Chancellor who made the order seems as little to have thought of them, because the counsellor probably were instructed only by the good people of Ludlow, and did not care for the people of Bromfield. But nothing effectual can be done in this matter without having before the Court (if they exist) the heirs at law of Mr. Charles Foxe. There may be no heir male of Charles Foxe living; but it is not very probable that Charles Foxe has left no heir—it is extremely improbable! but that is not put in issue in this proceeding—it is not asserted he had no heir, and it is impossible to proceed in this case without the heir at law of Charles Foxe, if there is

such heir at law in being; and if there is no such heir at law in being, the right that was in Charles Foxe is vested in the Crown, and the Attorney General, if he is not the party claimant, must be the party defendant. It is clear that this proceeding can answer no purpose but of expense; it can answer no good purpose whatever; it is impossible to act upon it if you had now before you that sum of money that may be finally reported due upon these proceedings; you cannot attend to those subsequent proceedings except for illustration. If you had it now before you, or the Court of Chancery, if they had it in Court, they could do nothing with it; what has taken place since we have nothing to do with, further than as it affords an illustration of these modes of proceeding; it is impossible to proceed upon it. If such an order had been made, the money ought to be paid; if not paid into Court, to trustees appointed for the purpose of carrying the trust into execution: no such trustees are named, as far as I can find, and even the relators are not trustees; they might as well have ordered the money to be paid to any of your Lordships as to these trustees. That is a necessary consequence of this sort of summary proceeding: the view of the Court is confounded by not having before it a regular proceeding on record in which the matters are put in issue, and the decree founded upon the matters so put in issue, and that decree regulating all the subsequent proceedings, the house acting upon the regulation so introduced by the original decree in the cause. I use that only for the purpose of illustration, for otherwise it is not properly before you, although there is a great deal of other matter in these cases. That part of the order of the Vice Chancellor which directs an appointment of new trustees has never

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GARRISON
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been acted upon at all; and I wish to know what right the Master had to make the report he has made without having other parties before him. If one looks at this case one sees with what a temper the whole of these proceedings have been carried on; indeed, it must express my surprise at the original order; the original order proceeds in great degree, though not with the same violence, to charge this Corporation with a breach of trust. Now that they were guilty technically of a breach of trust is certainly true. They were guilty of a breach of trust when they took upon themselves this conveyance—this was itself a breach of trust; they had no right to interpose themselves as trustees, and they must endure all the consequences of that improper conduct on their part: they put themselves into the character of trustees where they had no right to put themselves. But when I look at this case I think there are facts to try the truth of the evidence without any thing else. The Noble Lord now at the head of the Government in Ireland, when he was in India did me the honour to consult me upon several matters relating to the Mysore country; and amongst other things informed me of a report made to him by the Agent at Mysore, and he related a conversation with a Bramin, the Prime Minister of the Native Prince at Mysore, upon the extraordinary contradiction of evidence he observed in their Courts of Justice: ten persons would swear one way and ten other persons the contrary; and he said, How is it you are able to distinguish the truth? The answer was, it was certainly very difficult, but the way in which we act is this: we endeavour to find out some circumstance which is unquestionably true, and by that circumstance we try all the rest. I happened to mention

this to a gentleman; now the Chief Baron of the Court of Exchequer in Ireland, then Attorney General in Ireland, and he said that is what we are obliged to do in Ireland; we often find ten people swearing one thing and ten people another, directly in contradiction to each other, and we endeavour to find out some fact to try the truth of the evidence. Applying that rule to this case, there is a fact which seems to me to be pretty strong to show that the Vice Chancellor, afterwards the Master of the Rolls, did not properly try the contradictory evidence; for it appears that the surviving trustee named in the last of these deeds died, leaving two infant grandchildren, who were his heirs, and at his death it became the person interested in this charity, the parish of Ludlow as far as it was interested, and the parish of Bromfield also, that they should immediately at least have instituted a suit to have proper persons appointed; but it was suffered to remain forty years in that condition, and all the objects of the charity alienated. After a length of time, the grandson of the surviving trustee became of age, and returning to England from abroad, he proceeded first of all to recover the property which was the foundation of this grant, and was put to a considerable expense in that proceeding. Upon his dying, his brother went on in the same way with the suit. Those gentlemen were certainly trustees, as heirs of the surviving trustee, therefore they carried it on very properly; being put to expense and trouble in this proceeding they were very glad to get rid of it, and willingly enough transferred this to the Corporation of Ludlow, receiving from that Corporation an indemnity for what had been so done.

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Now this fact, that for so many years this charity was left in this situation, proves to me what is the truth of the evidence in respect to the state of this charity. I believe it to be perfectly true, as it is stated, that there was not a whole window in this chapel, and that all the pews were burnt; that the boys and girls of the place played at ball, or any thing else there; nay, that they built up with loose stones a wall for the purpose of playing in that archway: the very circumstance of the desertion of that charity for so many years convinces me that that evidence is true, and that the evidence on the other side is not true.

All that has been done in this proceeding has been money thrown away; and after all is it possible for any effectual proceeding to be had for the purposes of this charity but by an information in the name of the Attorney General? Such an information it is said has been already filed for the purpose of vacating this lease. But how can they proceed in that information if they have not the heirs at law of Charles Foxe before the Court, or cannot show by fair evidence that he died without heirs at law? I apprehend the Court can make no decree upon that information as it stands. The first proceeding upon that information, as I apprehend, must be to direct an inquiry to be made, whether there is such a person as the heir at law of Charles Foxe; and I also apprehend, that upon that proceeding, there must be some means found to ascertain whether this is a chapel for the purposes mentioned in the petition in this case; that is, whether it is a parochial chapel or no: if it is not, what is to be done? Are the funds to be applied for the purpose of rebuilding this chapel if it cannot be used for the purposes mentioned

in these papers? It is therefore evident to me that this is not a case within the true intent and meaning of this Act of Parliament; that the Act meant to apply to those sort of single cases where nothing was to be inquired but whether A B and C made parties to the petition, had been guilty of a breach of trust, and to order that to be done in consequence which seemed fit and necessary. Where a proceeding by information is necessary, there can be no use in this summary proceeding, which was certainly intended by this Act to supply the purposes of an information, and to prevent expense; whereas, if it is to be used for the purposes to which it is intended to be applied by these proceedings, there must be an information, and the proceeding by petition only increases the expense.

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Under this apprehension, I conceive it is clear that no order could be made by the Vice Chancellor; he ought to have said, this is a case which cannot proceed by the summary mode, you ought to have proceeded by information; this is not a case within the Act of Parliament; I have no jurisdiction to pronounce an order. The Vice Chancellor under the circumstances of this case, was not authorized by this Act of Parliament to pronounce any order whatever; he had no right to direct trustees to be appointed, because the deed before him expressly directed that the heirs of Charles Foxe should nominate the trustees: what right had the Vice Chancellor to supersede that direction in the face of the deed itself? Certainly none: the proceeding was improper, and the order which has been pronounced must be reversed: the petition must be dismissed, the Court not having power to pronounce upon it.

With respect to the subsequent proceedings, they

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are not before the House, and we cannot pronounce any order upon them. With respect to Lord Powis, he has no business here, and as this is a case in which all parties are wrong, the consequence is, that being all wrong, each must pay his own costs; it is a consequence of the bad advice they have received.

I think it extremely important upon this occasion to signify what appears to me, at least, to be the true and proper construction of this Act: the Act itself, though certainly it has the reputation of being framed by a very respectable and a very able person, yet I must say that it has the appearance somewhat of haste. One question has arisen upon it, I am told, whether an information could not be filed by the Solicitor General? The words in the Act are "the Attorney or Solicitor General." Now that has arisen from the haste used in drawing this Act. The learned person who is supposed to have framed it himself, must have known that the Solicitor General could not act of himself when there was any person occupying the office of Attorney General: perhaps he thought it was so well understood that it was not necessary to insert words for the purpose; but there ought to have been inserted in this Act the words, "by the Attorney General or in the vacancy of that office by the Solicitor General." Those words, to make this Act correct, ought to have been so inserted, but all who are cognizant of the law must interpret it in that way.

There is another thing which ought in prudence to have been inserted, but perhaps the person who framed the Act thought it the natural construction, viz., that the proceedings should be constantly under the control of the Attorney General, because it seems according to the expressions of the Act, that having

igned the petition there is an end of his office, and that the Attorney General has nothing more to do with it. That cannot be the meaning of the Act; the Act does not import that you are to take away from the Crown the authority which it exercised in cases of charity by means of its officer the Attorney General; the Attorney General is merely the representative of the Crown; it is in right of the Crown the Attorney General appears in cases of charity; it is not by any thing that is vested in him as Attorney General except that he is the officer of the Crown. The King, as *parens patrie*, interferes to protect his subjects who have an interest and who, from their situation, cannot themselves interpose in cases of charity; and if the application of any part of the property to superstitious uses had formed any part of the establishment of Charles the First, it would not have been the officer, but the King, who would have had the right to interfere.

In a case * which has been partly heard, your Lordships will have very seriously to consider these questions; having looked at that case with some view of this subject, I have no doubt in my own mind the information is there by the Attorney General. The only question is, whether the King has a right to interfere; whether, when a duty is imposed and that duty is not discharged, and there is no individual who has a right to compel the performance of that duty and to institute a suit in a court of justice for that purpose, it is not a part of the prerogative of the Crown, or whether the Crown has not generally a right, to compel the performance of that duty?

In the time of Lord Hardwicke, several cases occurred where informations by the Attorney General were before him which he dismissed, making the rela-

* *The Attorney General v. the Corporation of Dublin.* Argued 20. P., 23-26 Feb. 1827. The case will be reported.

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tor pay the costs; and he dismissed them for this reason, because they were improperly instituted: they were suits in which either the parties personal interests led to the institution of the suit, or the suits might have been wholly avoided; and if this had been an original proceeding before your Lordships, or if the decision of the Vice Chancellor had originally been to dismiss the petition with costs, I must have concurred in affirming the decision; because if four persons take upon themselves to institute such a proceeding, they ought to inquire whether they are authorized to institute it. I apprehend they are not authorized; at the same time there was an excuse to be made for them, we are told; namely, that in some cases the Court of Chancery had taken upon itself to make orders, which, according to the better judgment of the Court in subsequent cases, it would not now make. I believe Lord Hardwicke presided at the time when this rage for charity, something like the rage for Negro emancipation, carried the zeal of the people too far; and upon one occasion, where there was something extraordinary, (I am not certain that it was before Lord Hardwicke, I think it was Lord Macclesfield,) he said the Courts had forgotten a very common expression, that it was not lawful to steal leather to make poor men's shoes. In this case there can be no doubt there ought to have been an information, and not a proceeding in a summary way. No effectual order can be made upon the proceeding now before your Lordships. As to one part of the case an information has been actually filed, and that information might with propriety have embraced the whole case; instead of saving expense, this has been a proceeding to create an additional and unnecessary expense, and after all it cannot be applied to any useful purpose.

Why were commissions for charitable uses in these cases not pursued? The Act of Queen Elizabeth directs the Court of Chancery to issue in certain cases commissions to inquire by commissioners, who were to be respectable persons, and were to proceed upon the verdicts of juries. Under these commissions questions were tried constitutionally, and by the interposition of a jury. The commissioners, upon the finding of those juries, made decrees, and those decrees were subject to review by the Chancellor, and he might affirm or reverse those decisions founded upon the finding by juries. We may grant that that was a much more solemn way than this, in which questions of fact were to be tried in the ordinary way of trying questions of fact, by the cross-examination of witnesses instead of proceeding as has been done in this case, merely upon affidavit, in which there is no cross-examination. Now in this case can it be doubted, if the persons who made those affidavits had been cross-examined, that the case would have come out very differently on both sides. One side has sworn a great deal too much, because not checked by cross-examination; and the other side a great deal too much the other way. Those are consequences which the commissions for charitable uses provide against, by trying questions of this kind before a jury, in which all the witnesses might be examined in chief and cross-examined. Why have commissions for charitable uses not been issued of late years? because it was found instead of tending to diminish expense that they created it, and unless this Act of Parliament is confined within very narrow limits, I have no doubt in the world it must have the effect it has had in this case, namely, creating expense instead of diminishing it. Upon

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the other branch of the question, in what manner the trust shall be executed, and how trustees are to be appointed, that may be done by petition to the Chancellor; it is a very simple case, in which the Chancellor may give directions upon the subject; but if there is a question what is the nature of the trust, and who are the parties to manage it, it is not a case for a petition, but the party ought to proceed by information.

I have troubled your Lordships very much at length upon this case, because I thought it most important that it should be rightly understood that this Act is confined within a narrow compass; and unless it is so confined, instead of being productive of convenience it will be productive of inconvenience, and instead of saving expense in the administration of charities, it will be the means of creating very great expense without at all facilitating the object in view. It is upon this impression that I move your Lordships to reverse the order that has been pronounced by the Vice Chancellor which is complained of, and which is complained of only in part. It is in effect complained of with respect to the whole, though in terms it is complained of only in part, and that has produced some difficulty in my mind on the case; but I apprehend if you are of opinion that under the circumstances no order can be pronounced upon the Vice Chancellor's order, that then you are, from the nature of the case, compelled to reverse the order, without attending to any particular exceptions; and if the substance of the order is wrong, the only course for you to pursue is, to reverse the whole of the order. With respect to the other Appellant, you ought to declare that the interposition of Lord Powis in the character of Ap-

pellant, was wholly irregular, and that his petition of appeal ought not to have been received.

The Lord Chancellor.—Upon this petition, as to some points, there can be no hesitation what the House ought to do, or to forbear to do. As to the question whether the Master ought to have made his report in 1817, or whether the subsequent orders not appealed against should or should not have been made, the House has nothing to do with the consideration of those points. The single question here is, ought the Vice Chancellor's order of November 1815 to be reversed; if that order is reversed, it follows of course, that what is stated to be the order of the Chancellor of September 1821 (if it be the order of the Chancellor) ought also to be reversed; and I do not think I should be doing justice to the character of a deceased Judge of a very high reputation, if I did not most distinctly admit, that upon the 12th of September, 1821, the present Lord Chancellor had in his own hand writing handed out a minute confirming that order. It is a duty I owe to Sir Thomas Plumer's memory to state, that though that order of confirmation has been most irregularly drawn up, it is most undeniable, that upon the 12th of September, 1821, those words flowed from my own pen, and when the question may be put in this way: are you to reverse or to confirm the order of the Vice Chancellor? and what I must now take to be the order of the Chancellor, whether it was his order or not, for being drawn up, and that order not being discharged by any subsequent application, it stands upon the records of the Court as the order of the Chancellor, proceeding either correctly or incorrectly upon the authorities that are to be found for it.

It is my habit to put down short notes of what I con-

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ceive may be right to be done, giving to the parties an opportunity of representing why they think that which I think right, is wrong. This order was made upon the 12th September, 1821, when the Lord Chancellor could have very little assistance from the gentlemen at his own bar. The whole question now is, are those orders made consistently with the true intent and meaning of the Act which is usually called Sir Samuel Romilly's Act? With respect to the jurisdiction of the Attorney General in charity cases, I have always stated it to be his duty to watch every proceeding from the commencement to the end in an information by relators; for certainly I could never understand why relators are to have the sanction of the Attorney General, if it was not founded upon this principle, that the Attorney General, proceeding on the one hand as representing his Majesty in courts of justice, was to take care that those interests should be protected which the relator sought to maintain, and that he was likewise to take care that those against whom it was to be sought, were not to be oppressed.

The Act upon which we are now proceeding is an Act which is part of the law of the land, and according to that law we must proceed in courts of justice. I do not at present enter into the consideration whether Parliament did or did not act wisely in that particular act of legislation. It is an existing Act of Parliament which binds courts of justice. The question therefore is, have we or have we not in this order done that which Parliament meant we should do under the authority of that Act of Parliament? There is no denying that it was a very favorite Act at the time when it passed, though it has been open to great difficulty in the construction. That

learned and most respectable person himself, who is known to have been the author of it, did over and over again maintain, as Counsel at the bar of that Court in which I have the honour to preside, a construction of this Act which goes far beyond what is now the acknowledged construction. Those words "breaches of trust," to be found in the Act of Parliament, have been so largely construed as that a great many cases have passed there without an objection being taken that those proceedings were out of the reach of the provisions of the Act in the presence of the author of that Act. However, I think we have now got to this restriction, (and I shall be glad to have the sanction of this House upon the present occasion, if your Lordships agree in the judgment proposed,) that this Act is to apply only to simple cases, and not to cases as involved as some of those have been in which, without all question, orders of the Court have been made upon petitions founded upon a much larger view of the authority of the Court than could be now maintained with any hope of success.

With respect to the petition of Lord Powis, he being no party in the Court below, it appears to me he has no right to interpose by appeal, and that petition must, upon the ground that has been stated, be removed from this table.

With respect to the facts of the case, we find that in the year 1590, there was unquestionably a chapel in this place, called Saint Leonard's Chapel; that is quite clear, because the purchase deed of Mr. Foxe states the fact that there was that chapel. In the year 1769, when the family of that name was reduced to the individual who seems to have wished not to execute the trust any longer, a conveyance was made

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to the Corporation of Ludlow, and after that conveyance had been made to the Corporation of Ludlow, if an information had been filed in the year 1773, when they were about pulling down that chapel, either to enjoin them from pulling down the chapel, or if they had sold the materials, calling upon them only to account for the price of the materials, I should have said, without all question, that the corporation taking that conveyance in 1769, were parties to a clear breach of trust; that they were guilty of a most obviously clear breach of trust; because notwithstanding all that I can suggest to my own mind, with respect to the right of the Bishop as diocesan, with respect to the right of the Curate of Ludlow, if there be a curate, or with respect to the Rector of Ludlow, if he is a rector, or with respect to the heir of the Foxe family, when the Corporation of Ludlow by the instrument in 1769, took upon themselves to carry into execution all the charitable uses and purposes upon which this charitable foundation was made, and made themselves trustees for those purposes, that the Corporation being such trustees, had no right whatever to take upon themselves to turn diocesan, rector, curate, heir at law, or any thing else, and destroy the charity; and it is pretty obvious, I think, and no very strained construction of the matter to say, that those who took the conveyance in 1769, upon the trust to carry into execution the charity-purposes mentioned in that very instrument, that they put an end to it in the year 1773, giving an indemnity to Mr. Foxe, who conveys to them, actually contemplating when under a breach of trust, they became trustees, also to carry that breach of trust further by intending to do the act, and doing the act they did in 1773. That

raises the very difficulty whether looking at the whole that is stated in this petition, this is or is not to be considered a case within Sir Samuel Romilly's Act.

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The Court is bound to take care, (and I do not think that in this case I took sufficient care,) that the petitioners have a clear interest in the subject, and that they prove themselves to have that interest in the subject which they state upon their petition. I mention this circumstance the rather because Sir Thomas Plumer in his judgment proceeds upon this as a parochial chapel: I mean, in giving the reasons of his judgment as they are reported. He does not state it to be a parochial chapel in his order; but let it be recollected that the petitioners do state it to be a parochial chapel: that they so treat it; and if they treat it as a parochial chapel, I apprehend they will be bound to show it is a parochial chapel, if they are seeking for the maintenance of their rights as such parishioners. Now if they fail in proving themselves to be such parishioners, it does not therefore follow that the Corporation of Ludlow was not guilty of a breach of trust; because, whether this was a parochial chapel or not a parochial chapel, provided the complaint were recent and brought by persons competent to bring it, and in a form in which it was competent to make the complaint, I should say it was a breach of trust by the Corporation of Ludlow, whatever was the nature of the chapel. For they who took the conveyance as trustees to maintain the chapel, had no right to exercise any notion of their own, and destroy the possibility of executing that trust. But when the petitioners come to state that it is a parochial chapel—which is what they state in effect—when they say that their

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interest is founded on their character as parishioners, I apprehend the Court is bound to try that question, because it is the issue that they offer; that we as parishioners have a right in this, and therefore if the order stops short of such an inquiry as that which the case would require, and the Court ought to have directed, I apprehend that would be an objection to the order itself.

But there is another question, which it is quite impossible to deal with in this short mode of proceeding under this Act; and that is, whether, supposing them to have the right, it is competent to them (I think this is a question that should be decided upon an information, and not upon petition); whether it is competent to them as parishioners to see this destruction taking place in the year 1773, and to make no complaint in any form to any Court until the year 1815; that is to say, whether they shall for forty-two years together acquiesce in this, and then at the end of forty-two years come into Court to have that done (for you are to look at the prayer of the petition) which, under the circumstances that have taken place during their acquiescence for forty-two years, cannot be done. Sir Thomas Plumer's order about inquiring into the value of those materials, and so on, might be right upon an information recently brought. It might be very right as to the particular objects; but could it be possible, without going a great deal further, to maintain, that even upon an information, without other parties, you could have entered upon the soil of the ground where this chapel stood, recollecting how that is now occupied, merely upon bringing before the Court a case in which you might establish the right you sought to maintain; but which you

could never maintain effectually without having destroyed other rights which this petition could not destroy, because we have agreed that a right granted to a third person cannot be destroyed by petition.

In the first place, it is open to the most serious consideration, whether after such a length of time, regard being had to the authorities, you can or cannot give the relief that is asked even by information. And in the next place, if there is to be an information, under all the circumstances that now attach upon this property, an information for that purpose, which is the prayer of this petition, to rebuild or restore this chapel to the state in which it was in 1769, that is the walls of it and so on; I say you cannot get the length that is necessary to do justice between all persons interested in this case, without various other parties, and without other proceedings, which proceedings with reference to other parties, I am not aware could be mixed up in this petition; after you have got this proceeding upon petition, you must begin the other proceedings by information, to set aside the lease, and obtain those directions consequential upon the destruction of the lease, to carry this charitable institution and all its purposes into effect.

The result upon the whole of my opinion is, that in making this order, Sir Thomas Plumer has made an order upon a petition which ought only to have been made upon an information; and I think it but justice to him to repeat, that I have fallen into that error myself. Let it however be recollected, in justice to Sir Thomas Plumer and myself, that a great deal of what has now been stated in objection to those proceedings, is stated upon a further consideration of the proceedings, upon matter, in many respects,

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additional to all that the judges in both the Courts below heard upon the subject. The public is much indebted to Mr. Hart for bringing this matter before this House, in order that the true intent and meaning of the Act of Parliament may be better understood, and that we may avoid in future those errors which the Court has fallen into, not in this case only, but I am afraid in many other cases.

There is not the least pretence for dismissing those orders with costs; both the parties have been very much to blame in the business: the Corporation never ought to have taken this trust, and the manner in which they have dealt with it, does not entitle them to costs. It is right that the order in the Court below should be reversed, without costs on either side.

After these opinions had been delivered, the Attorney General and Mr. Hart suggested that certain costs paid by them under an order, which by the judgment now about to be pronounced, was ascertained to be erroneous, should be refunded.

Lord Redesdale.—It is the fault of the Corporation of Ludlow to have suffered this case to go on without making earlier application to this House; if they have suffered any thing in consequence of not so applying, it is the result of their own negligence. When Sir Thomas Plumer, as Vice Chancellor, pronounced that order, if the Appellants were dissatisfied with it, they might immediately have appealed to the Chancellor, without having incurred any other costs than the costs of the petition. They did not think fit to do so, but they suffered the case to go on a considerable time, and then they appealed to the Chancellor, and the Chancellor affirmed the order; and I must now take it, because I have no

doubt that the fact was so, that it was not drawn according to the intention of the Chancellor and the direction he gave. It was their duty to have applied to discharge the order drawn up contrary to the Chancellor's intention; they have not done that; and the consequence is, as it seems to me, that the difficulty they have got into, has been owing entirely to their negligence: whether they can or ought in any manner to have those costs is another thing, but I think it is a subject upon which this House cannot act.

The Lord Chancellor.—There is another reason which makes it very difficult for this House to deal with it; upon the 18th of June 1818 there is an order not appealed against, which not only directed the Appellants to pay the costs of the application then made, but goes on to order also that they should likewise pay 160*l.* 6*s.* 8*d.*, the former costs.

Mr. Hart.—That is not appealed from to this House, because there is upon that subject an appeal from the Rolls to the Lord Chancellor not yet decided.

Lord Chancellor.—Then upon that appeal the question whether you should be ordered to pay those costs or not, may be discussed below.

Judgment Reversed.

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(IN APPEAL FROM THE COURT OF CHANCERY.)

ZACHARY MACAULAY Respondent.

EDWARD SHACKELL, THOMAS ARROWSMITH, and WILLIAM SHACKELL Respondents.

Where a libel had been published, and the person libelled elected to seek his remedy by action for damages, and to the declaration in such action, the Defendant pleaded a justification, the truth of the facts constituting the libel, and that against the Plaintiff in the action a bill, stating that the transactions in question took place in a distant colony, and that the witnesses to the facts were not in England, and praying a Commission to examine those witnesses, had been obtained from the Defendant, and an injunction to stay proceedings in the action until the return of the Commission: Held upon a demurrer to the bill in the Court below and upon appeal that the Plaintiff in equity was entitled to the Commission and the injunction. But as to the discovery, the Plaintiff having, in his bill, charged and interrogated upon facts impeaching the character of the Defendant in Equity, and facts, which might subject him to a criminal prosecution, whether such Defendant is bound to answer any interrogatory which indirectly tends to establish the charge, or any interrogatory affecting him with moral turpitude or degradation of character. *Quere.*

Such a bill is not sustainable where it appears that the evidence is not material to prove the case at law. The bill ought therefore to shew what are the pleas at law. But if it refers to them, so as to make them part of the bill, it is sustainable. To support such a bill it is not necessary to allege that the witnesses were residing in England at the time of the publication of the libel, or have since left it.

ON the 1st of July, 1824, the Respondents filed a bill in the High Court of Chancery, stating that there had been for some years back, and was in the month of October, 1823, printed and published a certain weekly newspaper, entitled "John Bull;" and that, towards the latter

end of the year 1823, a Controversy arose and took place relative to the State and Condition of the West India Islands and the Slave Population there; and that Edward Shackell, as the printer and publisher of the said newspaper, engaged in such controversy, and published in the said newspaper, divers articles of intelligence, arguments, and observations, in and about such controversy; and that Zachary Macaulay had been for many years actively engaged in divers societies, professing to have for their object the abolition of the slave trade, the improvement of the condition of the negro population of the West Indies, and the civilization of the west coast of Africa; that the said Zachary Macaulay took an active part in the aforesaid controversy, on the side opposite to that advocated in the said newspaper; and that on the 26th of October, 1823, in the course of such controversy, the complainant, Edward Shackell, printed and published a number of the said newspaper, in which is a passage in the words and figures following; that is to say, "Of all the papers printed in the metropolis, we believe we may take to ourselves the exclusive credit of having prognosticated the evils which have arisen to our occidental possessions from the laudable efforts of the saints. We alone have stood forward to vindicate the West Indian planter against calumny and aspersion—we alone have made the struggle in defence of his character and property—we have called with a loud voice—we have sounded the alarm. This, let it be observed, we have done alone, and in opposition to the powers that be. It cannot but be gratifying to us, therefore, to find that Government have resolved to send ships and troops immediately to the West

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" Indies, to protect the lives and property which
 " have been put into jeopardy by the agitation of the
 " emancipation question in Parliament. In another
 " part of to-day's paper we have commenced an ex-
 " posure of the character of Mr. Wilberforce, which
 " we purpose to continue. It is impossible that we
 " should suffer a person, whose name is known all
 " over the world, to use the influence his notoriety
 " gives him for such purposes as those to which he
 " has been pleased to apply them; and it is only by
 " ripping off the mask, which he has so successfully
 " worn for many years, that we can do our duty to
 " our country. Those who have traced the proceed-
 " ings of the African Societies through a series of
 " years—those to whom the names of Macaulay,
 " Stephen, and Wilberforce are familiar, will do well
 " to recall all the facts which have come to their
 " knowledge, arrange them, sift them, and analyze
 " them; and we think, after this calm examination,
 " their minds will be better prepared for what we,
 " perhaps, may have occasion to publish, than they
 " can possibly be at this moment. Far are we from
 " wishing to ask any question of Mr. Zachary Ma-
 " caulay, the once needy overseer, now elevated
 " into an opulent merchant, touching the sum of
 " 129,961*l.* 11*s.* 11*d.* paid to him on account of
 " Sierra Leone; nor do we mean to inquire how
 " much philanthropy was blended in the exertions
 " used to capture negroes, for which upwards of
 " 275,000*l.* has been paid by Government. We cer-
 " tainly have no desire to recur to the paltry sum of
 " fifty guineas, which Mr. Macaulay actually took
 " for sending home upwards of ten tons of white
 " rice as a premium, which, we believe, he himself
 " proposed that Government should offer. We do

“not mean to call public notice to the fact, that in
 “the same page of the accounts of the Sierra Leone
 “Company, in which the sum of 14l. 5s. 6d. is charged
 “for clothing African boys at school, there is an
 “item of 107l. 12s. for a piece of plate to Mr. Ma-
 “caulay, ~~to~~ that Mr. Macaulay who served himself
 “in all he did for the Sierra Leone Company, or the
 “African Institution, who had obtained nearly a
 “monopoly of the trade, constant freights for his
 “ships, the prize agency of almost every man of war
 “since the abolition, the agency for the governor,
 “garrison, seizures, and a control over every thing
 “in the colony; who, when the colony was given up
 “to the Government, appointed himself King’s
 “Agent, which, however, the late Duke of Portland
 “did not sanction; we care not for all this: this, if it
 “be not sanctity and purity, is human nature, and
 “we find no fault with Mr. Zachary Macaulay for
 “feathering his own nest; but we must have off the
 “mask—we must strip him of his cloak—we will
 “have the world to see a very active, bustling,
 “worldly, enterprising man, making his way in the
 “world, and getting rich from a mean origin and a
 “humble station. But we will have no cant—these
 “Gents have gone on quite long enough—they have
 “played their game to the extent of risking our
 “colonies once or twice before; those colonies are
 “now in actual danger—it is no time for half-
 “measures—the moment to strike the blow is at
 “hand, and the saints and their motives must be ex-
 “posed. In all we have said of Mr. Macaulay, we
 “have said nothing that could injure any man who
 “did not set himself up as a spotless moralist, an
 “unworldly philanthropist; perhaps Mr. Macaulay
 “may remember to have read a petition from the

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"Nova Scotia Settlers to the Directors of the Sierra Leone Company; there is in its paragraph in which they complain that Mr. Clarkson had promised, amongst other things, they should be supplied with every necessary of life from the Company's stores, at the moderate advance of 10 per cent. on the prime cost and charges; that while Mr. Clarkson remained in the colony they paid no more; but since that they were charged upwards of 100 per cent. At the time alluded to Mr. Zachary Macaulay had the monopoly of trade: perhaps Mr. Macaulay may remember the time when the African Institution obtained the direction of the Crown estates in Barbadoes, in order to try experiments for the amelioration of the condition of slaves; the consignments fell into the hands of Messrs. Babington and Macaulay and perhaps Mr. Macaulay will recollect, that the agent for the ships of war claimed and received from the Navy Board large sums as bounty upon captured negroes, payable by government when the prizes were finally condemned: perhaps he will remember that the sentences of the Colonial Vice-Admiralty Court were reversed by the High Court of Admiralty in England, that this agent then informed the commissioners that he was ready to refund 5,000*l.* upon application, which was made, and the money paid; but it was at the same time discovered, that the agent still held in his hands 46,000*l.* more bounty money, which he had retained, while the cases were under appeal, and as he could not legally hold the same, he was compelled to refund that money also; the commissioners then demanded the interest for the time he had kept the principal, the agent refused to pay it, and the affair

"was put into the hands of their solicitor—this agent
 "was Mr. Zachary Macaulay: Mr. Macaulay may,
 "perhaps, remember that when Mr. Stephen wrote
 "those letters which bear the signature "Truth," he
 "mentioned the fact that the Berbee commissioners
 "so rigidly adhered to the principle of economy,
 "that they borrowed the house of a friend as a place
 "of meeting; this very Mr. Stephen subsequently
 "signed a report, being one of the commissioners, in
 "which it is declared that the commissioners found
 "it necessary to appoint a secretary at 300*l.* per
 "annum, which included, however, the expense of
 "an office; to this secretary then, in an unprece-
 "dented manner, the commissioners gave 300*l.* per
 "annum, while every other consignee of West
 "India property carries on all the correspondence,
 "and pays his clerks and office rent and other ex-
 "penses out of his commission—this secretary was
 "Mr. Macaulay: perhaps Mr. Macaulay will recol-
 "lect the circumstance of removing the field women
 "from town to Sandvoort, and tearing them from
 "their husbands and families, which excited discon-
 "tenty and induced the necessity of punishment:
 "perhaps Mr. Macaulay may recollect that the ob-
 "ject of this breaking every tie which the abolition-
 "ists profess to maintain; and in doing that upon
 "which the whole anger of the African Institution
 "has in all other cases been fulminated, was con-
 "sidered favourable to the property of the commis-
 "sioners, and the consequent augmentation of the
 "obligations to England; the consignees were
 "Messrs. Macaulay and Babinoton."
 "The bill then stated that although such number of
 "the said newspaper was published on the 26th of Octo-
 "ber, 1823, yet the said Zachary Macaulay took no

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notice thereof until the latter end of the month of January, 1824, when the said Zachary Macaulay having discovered, as the fact was, that the several witnesses, by whose testimony the Plaintiffs could establish and prove the several allegations contained in the said passages, were abroad, and not likely to be in England, he, the said Zachary Macaulay, did, in or as of Hilary Term, 1824, commence an action at law against the Plaintiffs in his Majesty's Court of King's Bench at Westminster, and declared in such action, in or as of the said Hilary Term, 1824, and in the first count of the declaration filed in such action, the said Zachary Macaulay complained of the whole of the said passage so printed and published as aforesaid, on the 26th of October, 1823, as being, and charged the same to be, a false, scandalous, malicious, and defamatory libel, of and concerning him, the said Zachary Macaulay; and in such count the said Zachary Macaulay set forth the whole of such passage; and in the second, third, and fourth counts of the said declaration, the said Zachary Macaulay set forth particular parts of the said passage, and laid his damages in such action at 10,000*l.*

The bill then further stated, that by leave of the Court of King's Bench, the Plaintiffs, on the 20th May, 1824, pleaded divers pleas to the said action, the justification of the several allegations contained in the said passage so printed and published on the 26th October, 1823, as aforesaid, and therein alleged, as the facts are; that the several allegations contained in the said passage were true.

The bill then charged, that Zachary Macaulay intended to press on the trial of the action, without allowing the Plaintiffs to prove the truth of the allegations contained in the said passage, and refused to con-

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to a commission or commissions issuing in the session for the examination of such witnesses who denied or to admit the truth of the allegations. . . .
 exhibit then proceeded to charge, that Zachary Macaulay had been engaged in the service of a Mr. M'Leod, at present in Jamaica, and had in such service superintended the plantation of the said Mr. M'Leod, and that in needy circumstances, and had, in man-
 foresaid, been a needy overseer of a plantation in West Indies, and had become, and when the passage was published was, an opulent merchant, and that the sum of 129,951*l.* 11*s.* 11*d.* has been paid to the said Zachary Macaulay on account of his colony at Sierra Leone, and that upwards of 100,000*l.* was paid by the government of this country for the capture of negroes, who had been unlawfully made slaves, and in which payment the said Zachary Macaulay had an interest; and that the said Zachary Macaulay, on or about the 1st of January, 1808, proposed to the said government, that a premium of five guineas per ton should thereafter be paid by the said government to such persons as should import, from the west coast of Africa to England, white rice, the produce of the said west coast of Africa, and that such proposal was acceded to and agreed by the said government, and that in or about the month of January, 1808, the said Zachary Macaulay took and received of and from the said government the sum of fifty guineas, as bounty or premium for importing 10 tons of such rice; and that in the accounts of disbursements rendered to the directors of the said African Institution, on or about the 31st day of December, 1813, being the date mentioned and referred to in the said passage under the name and title of the accounts of

1827. The Sierra Leone Company, therefore, was not
 charged for clothing certain African boys
 at school, and in the same page of the said reports
 there is a list of 107 of 121, as having been paid
 out of the funds of the said African Institution for
 requests of plate given, and which was given by the
 said African Institution to the said Zachary Macaulay
 for his supposed services, who did them and in such
 manner serve himself in all he did for the said Sierra
 Leone Company, or for the said African Institution;
 and that the said Zachary Macaulay did not bear a
 monopoly of the trade of the said Colony of Sierra
 Leone, constant freight for divers ships of him the
 said Zachary Macaulay, the prime agency of almost
 every man of war belonging to the navy of this
 country, sent to or being at the said colony since
 the abolition of the Slave Trade, the agent for the
 seizures of property by the governor and garrison of the
 said colony, and a control over every thing in the
 said colony; and that when the said colony was
 given up to the government of this country, in the
 month of February, 1808, the said Zachary Macaulay
 did cause or procure himself to be appointed King's
 Agent in the said colony, but which appointment
 of the most noble William Henry Cavendish, late Duke
 of Portland, then being the first Lord Treasurer
 of his late Majesty's treasury, did not sanction, and
 that before the publication of the said passage in the
 said Zachary Macaulay had been and was now
 a bustling worldly enterprising man, making his money
 in the world and getting rich in the manner in the
 said place mentioned, from a mean origin and hum-
 ble station, and that in or about the month of Fe-
 bruary, 1793, a petition was presented by certain
 settlers from Nova Scotia at Sierra Leone aforesaid,

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to the said Directors of the said Sierra Leone Company, and that in the said petition there is contained a paragraph, wherein the said petitioners complain, that the said Thomas Clarkson had promised that they, the said petitioners, should be supplied with every necessary of life from the stores of the said Sierra Leone Company, at the moderate advance of ten per cent. on the prime cost and charges thereof respectively; and that whilst the said Thomas Clarkson remained in the said colony of Sierra Leone, they the said petitioners paid no more for the said necessities of life respectively; but that, since that time, they the said petitioners had been and were charged for the said necessities of life upwards of one hundred per cent. advance upon such prime cost and charges respectively; and in fact, the said Thomas Clarkson did promise that the said petitioners or settlers should be supplied with necessities from the stores of the said Company, at such advance of ten per cent. as aforesaid; and that whilst the said Thomas Clarkson remained in the said colony, the said settlers or petitioners paid no more for the said necessities respectively; and that after that time, and during the years 1791 and 1792, the said settlers or petitioners were charged for the said necessities upwards of one hundred per cent. advance as aforesaid; and that during the time the said settlers or petitioners were so charged upwards of one hundred per cent. advance as aforesaid, the said Macarty Macarty had the monopoly of the trade of the said colony of Sierra Leone; and that in or about the month of January, 1811, a certain Society called the African Institution, obtained the direction of certain Crown estates in Belfice aforesaid, in order to try experiments for the ameliora-

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tion of the condition of Slaves, as in the said passage mentioned, and that the consignments of sugar and other produce, made from the said estates, fell into the hands of Messrs. Babington and Macaulay, a house of trade wherein the said Zachary Macaulay was a partner, which consignments were a source of great profit and emolument to the said house of trade, and that during the years 1809, 1810, and 1811, the said Zachary Macaulay was the agent of certain ships of war which had captured Negroes, unlawfully made Slaves, and as such agent, claimed and received from the board of commissioners of his Majesty's Navy, divers large sums of money, as a bounty upon the capture of such Negroes, payable by the said government when the respective prizes or captures were finally condemned by legal authority, and that divers sentences of the Vice-Admiralty Court of the said colony, in the said passage mentioned, upon which the said bounty was received by the said Zachary Macaulay, were upon appeal reversed by the said High Court of Admiralty in England, as in the said passage mentioned, the said Zachary Macaulay, as such agent, afterwards, on or about the 1st day of January, 1812, informed the said last mentioned commissioners that he the said Zachary Macaulay was then ready to refund the sum of 5000*li* (and being the sum due from him as such agent, upon application for the same, and that upon application being made, the said last mentioned sum of 5000*li* was paid by the said Zachary Macaulay; and that it was afterwards discovered, as the fact is, that at the time when the said Zachary Macaulay appeared to have only the said sum of 5000*li* to refund, and when he paid the said sum of 5000*li*, he

held in his hands the sum of 40,000 more bounty money, which he, as such agent, had received while the said cases were under appeal, and which last mentioned sum, because he could not lawfully retain the same, he was afterwards compelled to refund, and that such commissioners also claimed and demanded of and from the said Zachary Macaulay interest upon and for the said last mentioned sum of money, for the time during which he had so kept the same, which the said Zachary Macaulay refused to pay, and thereupon the said commissioners instructed their solicitor to proceed against the said Zachary Macaulay for the recovery thereof, and that James Stephen, the person called Mr. Stephen, in the said passage, in the month of January, 1816, wrote certain letters, respectively bearing the signature of "Truth," and that in the said letters the said James Stephen mentioned, that the said Berberis commissioners so rigidly adhered to the principle of economy, that they borrowed the house of a friend as a place at which to hold their meetings as such commissioners, and that afterwards, and whilst the said James Stephen was one of such last mentioned commissioners, a report was made and signed by the said commissioners, whereby it was declared, that the said commissioners had found it necessary to appoint a secretary, at 300*l.* per annum to be paid to such secretary, but which salary included the expense of such secretary's office, and that the said Zachary Macaulay was appointed such secretary with such salary, as in the said report mentioned, and that such salary was an unnecessary and improper allowance to the said Zachary Macaulay in that behalf, and that all other consignees of West India property, at the same time, carried

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on their correspondence, and paid their clerks and office rent, and other expenses, out of their commission; and that the said Zachary Macaulay, while he was such secretary, was one of the consignees of the produce of the said estates in Berbice; and that in the month of December, 1812, certain women, in the said passage mentioned, and called the field women, being the wives of certain slaves employed in the town of New Amsterdam, in Berbice, were removed from that town to certain estates at Sandvort, in Berbice; and were thereby separated from their respective husbands and families, which excited discontent in their minds, and induced the necessity of inflicting punishment upon some of them; and that such removal of the said women was at that time considered as being advantageous to the property under the care of the said commissioners, and calculated to produce an augmentation of the consignments of sugar and other produce made by or on the account of such commissioners, from Berbice to this country; and that this property, and these consignments, was augmented and thus imported into this country, were afterwards, and during the years 1813 and 1814, consigned to the house of trade of Barington and Macaulay, and were to the said house of trade his source of great profit and emolument; and that by means of the several transactions thereinbefore charged, and in the said passage stated, the said Zachary Macaulay procured for himself great pecuniary profits and emoluments, and greatly promoted his worldly interest and advantage; that at and during all the several times of the transactions aforesaid, he did and Zachary Macaulay proposed and held himself out to the world to be a person of highly religious

and moral character and conduct, strenuously engaged in promoting, by all the means in his power, the cause of humanity and philanthropy; and as an unwearied philanthropist.

The bill then farther charged, that the Plaintiffs could not defend themselves against the said action to law, without proving the several matters charged in the bill and contained in the pleas; that, some correspondence, or written communication, had taken place between the Defendant and the Plaintiffs and also between the Defendant and some other persons or person relating to the matters aforesaid, or some of them, from which the truth thereof would appear, and which correspondence the Defendant refused to discover, although now or lately in his power, custody or possession, as well as diverse books, &c. relating to the matters aforesaid, in some of them, from which the truth thereof would appear.

The bill then farther charged, that divers of the witnesses by whom alone the Plaintiffs could prove the several matters aforesaid, were abroad in the west coast of Africa and in the West Indies, and in other parts beyond the seas, and that the Plaintiffs were unable to proceed to trial in the said action, without having one or more commissions for the examination of such witnesses.

The bill then contained interrogatories adapted to all the facts before stated and charged; called upon the Defendant to produce all letters, &c. and prayed for a commission or commissions for the examination of witnesses residing on the west coast of Africa and in the West Indies; and that the Plaintiff might have the benefit of the testimony of such witnesses respectively on the trial of the said action; and that

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in the mean while the Defendant might be restrained, &c. To this bill the Defendant put in a demurrer, shewing for cause, that the complainants have not, and by their said bill, shewn any right or title to the discovery, or to the commission and imputation thereby sought; and for further cause of demurrer, (that the discovery and commission, thereby sought, appear on the face of the bill, to be sought in aid of the said complainants' defence to an action therein mentioned to have been brought against them by this Defendant, for a defamatory libel, by the said bill admitted to have been published by the said complainant, Edward Shackell, against the Defendant, the publication of which libel, as appears on the face of the said bill, was an indictable offence; and for further cause of demurrer, that the discovery and commission sought by the said bill appear on the face of the said bill, to be sought for the purpose of enabling the said complainants to prove, on the trial of the said action, the alleged truth of certain pleas therein mentioned to have been pleaded by the said complainants to the said action, but which pleas are not in the said bill set forth with sufficient distinctness and particularity to enable the Court to ascertain whether the discovery and commission sought by the said bill are material to the defence of the said action; and for further cause of demurrer, as to so much of the said bill as seeks any discovery touching the matters contained in the libel, or statement therein set forth, and whereupon the said action is founded, the Defendant shewed, that such matters appear on the face of the bill to be of a scandalous and defamatory nature against the Defendant, and imputing to him moral

impudence; and as to the residue of the said bill the Defendant shewed, that it doth not appear on the face of the said bill that the witnesses, whom the said complainants seek to examine under the commission thereby prayed, nor any or either of them, were or was resident in this country at the time of the publication of the libel or statement in the said bill mentioned; or have or hath, at any time since such publication, left this country, or gone into parts beyond the seas.

On the 19th of July, 1824, the demurrer came on to be argued before the Lord Chancellor, who considered that it should be over-ruled.

Upon the over-ruling of the demurrer, an order was made, bearing date the 20th day of July, 1824, on the motion of the Respondent, that an injunction should be awarded for stay of the Appellant's proceedings at law, until the Appellant should fully answer the bill, and the Court should make order to the contrary; but the Appellant was in the mean time at liberty to call for a plea and proceed to trial therein, and for want of a plea to enter up judgment; but execution was thereby stayed.

On the same 20th of July, 1824, an order was made that the injunction should extend to stay trial.

On the 22d of December, 1824, upon the motion of the Respondents, and upon hearing read an affidavit of the Respondents, and an affidavit of the Appellant, it was ordered that the Respondents should be at liberty to sue out one or more commissions or commissions for the examination of witnesses at Sierra Leone, and such of the West India Islands as the Respondents might be

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advised, returnable without delay, with the usual directions in that behalf: and it was ordered, that the injunction should extend to stay trial of the said action until the return of the said commission or commissions.

The Appellant, by his affidavit, in opposition to the motion, specifically, and in detail, denied the truth of the charges and insinuations contained in the alleged libel, and of the allegations in the bill founded upon it; and further said, that there were persons resident in this country, by whose testimony the truth of the matters in issue might be ascertained; and he verily believed, that although there were not nor was any witnesses or witness residing in the West Indies, or at Sierra Leone, whose testimony, if true, would enable the Respondents to defend the action, or enable them to prove the pleas therein pleaded; yet the Appellant believed that in consequence of the prejudices, irritation, and hostility, prevailing against him in the West Indies on the account therein mentioned, he could not safely put his character upon trial on evidence to be produced in the West Indies by commission; and the rather because the Appellant did not believe that he could, in the West Indies, obtain commissioners or agents to execute, or attend the execution, of such commission, who would be willing to encounter the danger and obloquy to which a faithful execution of their duty would expose them, and because the Appellant was advised, that it was doubtful whether a witness, giving false evidence under such commission, could be indicted for perjury there, and because if such indictment would lie, and an indictment for perjury were preferred in the West Indies

against a witness giving such false evidence, the prejudices and hostility, and irritation against the Appellant, prevailing in the West Indies on the account therein mentioned, were so strong, that there would be no prospect of such indictment being found, or should the same be found, of its being fairly tried.

The appeal was presented against the orders overruling the demurrer, and directing the commission on the ground that the publication of the libel being an indictable offence, the Respondents were not entitled to the assistance of a court of equity, their case being founded upon and arising out of the commission by them of such indictable offences; and that there was no precedent of a bill for a discovery and commission in aid of pleas to an action for libel averring the truth of the matters contained in the libel; and the establishing of such a precedent would put an end to actions for libel—the only effectual mode of vindicating character.

For the Appellants:—*Mr. Shadwell* and *Mr. Parnis*.

For the Respondents:—The *Attorney General*, *Mr. Sugden*, and (*Mr. Wakefield*).

In the course of the argument the following observations were made:—

Mr. Shadwell in argument having referred to the cases upon bills complaining of piracy of literary productions in which the courts of equity had refused injunction and account upon the ground that the works alleged to be pirated were libellous or crimi-

* The argument occupied two days. It being too long to insert fully, those points only are noticed upon which observations were made by the House.

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nal, and such as could not be made the subject of an action as matters of property,* put the case of an action for a libel against the publisher of *Halifax Wilson's Memoirs*, and asked whether the peers libelled in that work might be compelled to answer all the interrogatories which might be put to them in a bill of discovery?

The *Lord Chancellor*.—In the case you put, Mr. Stockdale might have pleaded that the whole matter was true. If he could have pleaded that the whole matter was true, are there any cases which show that he shall not have the benefit of the usual proceedings to prove that?

On that part of the demurrer which raised the question, whether the pleas at law were set forth in the bill in equity with sufficient distinctness and particularity—Mr. Shadwell having referred to a case of *Templer v. Lousada*,† in which the Lord Chancellor refused a commission.

The *Lord Chancellor* observed: What the Plaintiff in equity says here is this: "That the several allegations contained in the said passage (i. e. of the libel) are true, as by the said pleas, reference being thereunto had, will appear." Now in the

* *Walcot v. Walker*, 7 Ves. J. p. 1. *Southey v. Sherwood*, 2 Meriv. 435. *Lawrence v. Smith*, 1 Jac. 471. *Murray v. Benbow*, in Chancery, Feb. 1822, and the case of "*Don Juan*," before the Vice Chancellor, in 1823.

† *Sittings after Hil. Term, 1827*. The reporter has been informed by Mr. Russel, who was counsel in the case, that the bill was originally for a discovery and commission, but the Lord Chancellor, doubting whether the evidence proposed to be obtained would be a defence at law, and whether it was not a case for relief in equity, refused the commission, but gave leave to amend the bill, by turning it into a bill for relief.

case you refer to, that would enable the Chancellor to call for the pleadings; and the Chancellor will for them.—I believe it is a little new, but I long with you. I think when the Court of Chancery is applied to for a commission, it ought to see if the commission can be of use to prove something to establish the Plaintiff's case, or to establish Defendant's case.

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Lord Chancellor.—This demurrer must admit truth of that which is alleged in the bill. Then there is an express allegation in the bill that the reasons contained in the passage which is called *ellous* passage are true.

Lord Chancellor.—If you prevail upon the House to reverse the order respecting the demurrer, the rest falls to the ground, but in all the cases I found an answer is put in. The question then becomes, supposing the House support the order made in the demurrer, as to which I say nothing; supposing you cannot affect that order, are you at all law in filing an affidavit instead of putting in an answer? I put that to you as a point of practice. On this it was answered, that the application (the commission) being made on affidavit, it was law to file an affidavit in answer; and that the Chancellor in a former stage of the proceeding admitted the affidavit to be read without objection.

Shadwell, having cited the practice in the High Bench of putting off trials, and changing the issue on proof that a fair trial cannot be had on account of existing prejudices; the Lord Chancellor said, the cases which you mention perhaps are not so similar to a case in which it is contended that

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if there are witnesses in one part of the world, and those the only witnesses who can prove the fact, because they may be prejudiced they are never to be examined in a cause.

The Lord Chancellor. The question is, whether a court of equity should entertain a case of this sort, regard being had to the fact that it relates to an action brought that cannot be supported if a justification is made out, viz. the truth of the alleged libel.

Mr. Pepps having argued that the cases in the House of Lords were distinguishable; that the precedent of such a bill was to be found, and citing the case of *Montague v. Drummer*, in which Lord Hardwicke said, that no such bill of discovery and that case having ever been filed, he would go by the rule of Littleton, and would not make a precedent.

The Lord Chancellor observed: There are I think three cases in the House of Lords, in one of them it is quite clear, (is it not?) that the person who brought his action at law might have indicted the defendants; but instead of indicting the defendants, he brought an action for damages; and therefore the House allowed a bill of this kind to be filed, to have a commission abroad for the purpose of assisting a defence to be made to that action for damages.

The difficulty I have is to distinguish this case from a case of crime, and you are not quite sure that it can be called a libel till found to be so. No doubt in one of these cases they might have

* *Cojamaul v. Verelst*, 4 B. P. C. 407. *Nicol v. Verelst*, 10 B. P. C. 212. See the printed Cases in D. 12 1776. 2 Ves. 397.

† Two of them were consolidated.
§ *Nicol v. Verelst*.

dicted for conspiracy. I set off against the authority of Lord Hardwicke, the considerability of this House.

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Lord Chancellor.—Lord Mansfield (I am now from memory) laid down a doctrine, that you should not proceed both civilly and criminally; he should have his choice of an action or an indictment, but not both.* Then if a party chooses to sue on an indictment, and brings an action, has he a right to say that the public are concerned? On the other hand, for an information, you must make an affidavit that the facts alleged are not true, and that you have done so to avoid a libel on a merchant having been put of a libel on a merchant alleging his insolvency, an action for damages, on justification of the truth of the allegation, bill of discovery against the merchant calling him to disclose all the accounts of his trade, Lord Chancellor observed: I must consider hard cases on both sides, be it the merchant had admitted insolvency fifty years wholly as between himself and another merchant, he chose to indict the man for stating the truth could not be given in evidence at all, a verdict would be as much against conscience as a verdict in the other. (There is a notion that a man should be at liberty to prove the truth of a libel.) A defendant in cases that may be very hard situation upon an indictment that he cannot prove the truth though he be able to do it by fifty witnesses.

Reg. v. Sparrow. 2 A. & B. 198, where upon application for a writ of habeas corpus to remove the applicant from prison, the applicant was put in a box, and Ashurst J., said it was of course, if the information was granted to stay proceedings in an action for the same cause.

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The law puts it in this way: if you make your complaint on the general ground of mischief to the public, you must do it in the shape of indictment, and there is no defence if the fact is proved; but if you say you will give the public no protection but bring a civil action, then the question is, whether the law does not consider it is a question between A and B, and not between the public and an offender.

The law is (whether wise or not) that if a man proves the truth of the libel in an action, you have no right to complain of it; then the question really comes round to this, whether the defendant in an action shall be confined to such modes of proof as a court of law enables him to have or not; and that brings another which is a difficult question, whether a court of law which has the power to grant or not to grant a commission, would, in the fair exercise of judicial discretion, be justified in refusing such a commission if the proceeding were by action.

It having been said in argument, that it was the rule of the courts of common law not to permit a party to be delayed in his action by an application for a commission, unless he was in possession of facts and evidence to make out the truth of the libel at the time when it was published.

The Lord Chancellor observed, One of the first questions is, how that rule was introduced putting off the action till the commission returned; and the next question is, whether it is a sound rule, for I may have the greatest possible belief that I can prove the truth of the libel when I wrote the libel, but cannot do it at the time of the action. Suppose it related to a conversation passing between Mr. Pepys, the Attorney General, and myself, that

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you two shall have been made judges in India, does the Court of King's Bench, because you do not happen to be here but in India (when the libel is published), though here when the thing complained of occurred, will the Court say you shall proceed though I have fifty witnesses who could prove the fact, if I could have them examined; and it is to be recollected that upon interlocutory orders in a court of law, there is no appeal to this House; but in granting commissions in a court of equity, thank God, there is an appeal to this House.

The Lord Chancellor.—The law takes an odd turn in these things. The original jurisdiction of granting commissions was under the great seal, because no commission at one time could be granted in common law courts. Then, having adopted them there on their own authority, they pretend to tell us when we shall or shall not direct them.

It is a great thing for the subject that he may come here to appeal against an injudicious exercise of the jurisdiction of a court of equity, but in respect of commissions issuing from a court of common law the subject has no remedy at all.

What antiquity has that rule (of granting commissions in a Court of law)? It is quite modern, is it not? I am sure it was not the rule some little time ago. Is there not a case of this sort that may I see in the Court of King's Bench? If an action is brought, the party who is the defendant says, I had ~~two or three~~ three witnesses here at the time when I did that of which you complain, who have since in the course of their business gone to India, and I wish to have a commission to examine them. I put my-

1827. self upon the ground that you, the Court of King's Bench, require me to take, I make an affidavit that they were here when I published this: what would the Court of King's Bench say to that? It appears that they would grant a commission to aid a defence against a libel when the plaintiff was proceeding for damages. If in such a case the Court of King's Bench would grant a commission, that would reduce the case to this, whether the Court of Chancery is to act upon its own rules or upon theirs.

It having been said in the argument that the interrogatories of the bill calling upon the Defendant to state his origin and the history of his life, and all the means by which he had advanced his worldly interests, and to set out all profits made by him in trade, and a schedule of all correspondence and all the facts relating to the matters stated and charged in the bill, with an account of his profits in trade, &c., could not be answered, and were calculated only for delay and to stifle the action, not to aid the defence to it.

The Lord Chancellor said:—Was there any argument on the particular passages in the Court below, or only a general argument? It is a very material part of the case: Mr. Sugden will recollect in a late case* that it was thought not inconsistent to look into the declaration (and pleas) in order to see how far the Court of Chancery ought or ought not to grant a commission. If it appeared upon the pleas pleaded at law that the case which is sought to be made out in equity would not constitute a defence at law I would not let a commission go.

* Templer v. Lousada, ante p. 114.

Mr. Pears having cited the case of *Macaulay v. Morton*, as containing, in the argument of Mr. Madocks, as reported,* a statement of the case of *Nicol v. Verelst* differing from the report in *Brown's Parliamentary Cases*.

The Lord Chancellor said:—In that case a commission was granted, and the demurrer was overruled.

Upon the argument that the answer to some of the interrogatories might furnish matter of and expose the party to indictment, the Lord Chancellor observed:

In this case of *Macaulay v. Shackell*† the report of the case before the Vice Chancellor concludes in these words, "The report of *Kensington v. White* is too loose to afford a principle; and underwriting causes are not to be reasoned upon as furnishing general rules;" what I understand his Honor to mean, is with respect to the practice in underwriting causes, which is adding many together by the rules of consolidation; but unless they are going on in the Court of Exchequer in a way different from what they did when I had the honour of practising there, it is the practice to file such bills, and the parties are obliged to answer the underwriters as to those frauds which are charged.

Unless you find the policy of insurance has been found to be affected by gross frauds, there have not been many cases in which the underwriters have defended themselves by bringing bills of discovery.

When I attended the Court of Exchequer, underwriters frequently brought the assured into the Court, to be relieved against their liability in respect

* 1 B. C. C. 469. † 2 Sim. and Stu. 79.

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of the assumed actions against them, by pleading
frauds, which frauds would have been indictable, but
-but being suggested by the counsel that the charac-
-terisation of the Vice-Chancellor in *Kensington v. White*
applied only to the question of multifariousness,
which was the point in the case before him, in
-in *The Lord Chancellor said:—Take it for granted*
that it does, but it brings back to my mind a class
of indictment, bases in which this jurisdiction was
exercised. *Lord B. said:—of four to five of such cases*
-in *The Lord Chancellor said:—It is not my intention to*
advise your Lordships to interfere with judgment
at present. I always wish to be extremely cautious
in forming an opinion on an appeal from a judg-
ment of my own, and I requested of the Noble
Lord who is now come to the House, conceiving
it might be possible, as the fact has happened,
that there might be demands made upon his time
which would not allow him to attend here, and
requested him to take the papers with him, to
read them, and form his opinion upon them. I believe
this would confirm me, if I were to state that, upon
his review of what is to be found upon the papers,
he does not think there is any ground for this Ap-
-peal, but I shall feel it my duty to state to him,
with as much impartiality as I am able, all that has
been represented by Counsel from the bench before I
proceed to give my own judgment upon the subject.
-in *I think the question lies in a very narrow com-
-pass. There has been a great deal said about the
-mode which Mr. Macaulay has adopted with respect
to making this question of character, and I am
never in the habit of looking upon that as an im-
-portant point. At the conclusion of the Argument, the Recorder said:—*

proper motive. Every man whose heart is in the right place, would desire that parties should be reasonably indulged in endeavouring to set their character right, but in truth, as a court of justice, we have nothing to do with that. The single question is, whether Mr. Masaulay, having thought proper to bring an action for damages for that which, considered with reference to what is alleged, and which may or may not hereafter be proved, may be stated *prima facie* to be or not to be a libel, whether, according to the law of this country, the Defendants, from whom these damages are asked, can in that case of alleged libel, bring a bill in a court of equity, for the purpose of proving the truth of that which is stated in the papers to be a libel, it being true that if he justifies his act by alleging and proving the truth of what he has said, he has a valid defence to that action; that is purely the question before us. Upon that question, after I have had an opportunity of doing the parties the justice of stating to the Noble and Learned Lords as fully as I can, the arguments used on both sides, I shall proceed to give my humble advice to the House on this matter of the Appeal.

The Lord Chancellor.—This was an appeal from a decision of the Court of Chancery, pronounced by myself, and I therefore certainly felt a great anxiety that it should be submitted to the consideration of a Noble and Learned Lord, whose knowledge in the practice of the Court of Chancery, I think I may venture to say, is not excelled by that of any other person in his Majesty's dominions, and who has been at the head of the Court of Chancery in Ireland. It appears to me to be extremely desirable that his

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opinion should be obtained upon the subject and have asked him, therefore, as he was not present at the hearing, to peruse the case which have been laid upon the table, and I have taken upon myself the duty which I hope I have faithfully executed of setting to him the several arguments which have been pressed in objection to the order of the Court in *Levy's* as well as every other which has occurred to myself. If ever I had any doubt upon this case, after consideration that doubt has been removed. I believe I may venture to say that the Noble Lord, to whom I have alluded, has no doubt whatever upon this case, after having read the papers upon this subject, and heard all which could be stated to him in opposition to that judgment. The case is no more than this. Mr. Macaulay considers himself injured by the publication of a so-called libel. When a libel is published, the person who is the object of that libel has different modes of pursuing the person who has thought proper so to libel him. He may apply to a grand jury, and if they find a bill of indictment inasmuch as that is a proceeding which has its principle in the allegation that there is a breach of the public peace, and that is therefore a proceeding rather on account of the public injury than the private right, the law does not allow the truth of that libel to be given in evidence in that proceeding. There is another mode of proceeding, a sort of criminal proceeding, and that is by applying to the Court of King's Bench for an information. That Court is in the habit of saying, (and with great propriety, if I may humbly state an opinion upon that.) If you will have this extraordinary remedy by information, you must deny the truth of the libel. If you do not think proper to do that you

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may proceed by indictment, but will not oblige
 you to extraordinary remedy. In this case Mr
 Macaulay (we did him justice, it should be observed)
 states in the affidavit he has filed, that his counsel
 advised him, for reasons that are represented, not to
 apply to the Court of King's Bench for an informa-
 tion. It is not my design to offer any opinion of
 your Lordships with respect to that advice, it is suffi-
 cient to say that the proceeding was not adopted,
 the proceeding by indictment was not adopted, and
 the reason given for proceeding to trial action, he was
 directly and reasonably does great credit to the
 person who does proceed in that mode, namely, that
 his intention is to vindicate his character and not to
 vindicate the public in respect of the alleged ten-
 dency to a breach of the peace, but it is perfectly
 settled law that if a person brings his action for
 damages occasioned by a libel, the party proceeded
 against may justify the alleged libel by showing in his
 plea that what he has so said and what is so alleged
 to be libellous, is perfectly true, and the law having
 established this doctrine, that for the publication of
 truth a man has no right to complain, (though the
 libel may tend to a breach of the peace,) and
 seek to receive damages if what which is alleged to
 be a libel is true.

There has been a great deal of observation upon
 the doctrine applying to the law of libel, that if the
 party is indicted, he shall not be at liberty to show
 the truth of the libel. The reason of that, as we find
 in our books, is that it is a breach of the
 public peace, that is the thing complained of, and
 whether the libel be true or false it may equally tend
 to a breach of the peace, therefore the mere truth of
 the libel shall not excuse the libel, but if the person

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who may proceed on behalf of the public thinks fit to proceed on behalf of himself for damages, the law has always said, as far as I can trace it, that the defendant may plead the truth of the fact in answer to that action for damages. In this case, such an action having been brought, the Respondents filed a bill in the Court of Chancery for a discovery and for a commission to examine witnesses abroad. To this bill a demurrer was put in, and a demurrer may (to use a familiar expression) cover a great deal too much; the demurrer was therefore overruled; and I cannot conceive that it is possible in any view of this case to say that that demurrer could be allowed so far as it seeks to defend a party against a commission, unless the case is of such a particular nature that a court of equity ought not to interfere at all; the demurrer certainly appears to have covered a great deal too much. Nevertheless the way in which this has been put at the bar is this: It is said that you shall not file a bill of this sort in a case where the matter alleged in the action is a law offence or an indictable offence. In the first place, I take that to be against precedent; in the next place, I doubt whether it is consistent with reason, because if a party chooses to consider the matter not as an indictable offence, and for his own benefit to receive a recompense in damages, it appears to me a little difficult to contend that he can with propriety say, though I am not pursuing this on the ground of its being an indictable offence, yet I do object to my the defendant, that the matter I am now proceeding upon is an indictable offence, and therefore I shall not have the common relief which the subjects of this country have in general cases on actions for damages. I believe

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It is said, moreover, that a libeller has no right to come into a court of equity. Now in the first place, one answer to that is, that you cannot consider it as more (whatever may be your individual opinion) than an alleged libel. In the next place, if the party thinks proper to go into a court of law for a recompence in matter of damages, that makes it a civil action, and making it a civil action, the question arises whether the Defendant has not as good a right to pursue his defence to it as a civil proceeding as the Plaintiff has to pursue it as a civil proceeding. In cases I have before me, not only in cases have been alluded to in which a court of equity has said, we will take no cognizance of the matter: in a case of copyright, for instance, it was argued at the bar that if a man published an obscene book, such a one as was mentioned at the bar about Mrs. Harriette Wilson, or if a man thinks proper to publish a book reflecting on Christianity, if such a man comes into a court of equity for the purpose of maintaining his copyright, and having an injunction against the violation of it, the Court will say, No, you do not come here with clean hands, and we will not assist you in the way in which you apply that we should assist you. But these cases are founded on property. The reason why the Court will not interfere in those cases is, that it has no criminal jurisdiction. A court of equity has no criminal jurisdiction, but it lends its assistance to a man who has, in the view of the law, a right of property, and who makes out that an action at law will not be a sufficient remedy and protection against intruding upon his publication. But in the case which has been put, the answer of a court of equity immediately on a bill being filed is this—Inasmuch as your suit here is

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founded on property, and that the law will not acknowledge you can have any property in such a book as this, we cannot assist you because the law has determined that you have not that property, which is the only thing we could protect. Now to take the instance of that book, the *Life of Harriette Wilson*, which has been talked of at the bar, I recollect, I think, to have read in the newspapers, that an action was tried, I believe, in the Court of Common Pleas, brought by a man for his labour in printing and publishing that book. The court of law, according to the representation made in the document to which I allude, said, You shall not recover in that action: the labour you have expended in producing a book which ought never to have seen the light is not labour in respect of which you can have any right. And here let me suppose that an action of libel had been brought on that very book, and I am now putting the case which was put at the bar, I apprehend that it would have been impossible consistently with precedent and what we know has been considered law to say, that if that action had been brought and a civil right was to be tried, a court of equity would not assist the Defendant in that action in trying, according to what was alleged upon the plea of justification, the fact, whether that justification was truly or not truly pleaded?

In reference to the facts of this case (the supposed facts, for let it not be understood that I am presuming to say that one word of the bill is founded in fact,) the alleged facts are supposed to have arisen out of what passed, I think, at Sierra Leone, and other places abroad, I believe, in the West Indies. To be sure prejudice must have reached a most monstrous height, if the affidavit in this case is

correct, that neither at Sierra Leone nor in any part of the West Indies, is it possible to have either the witnesses or the grand jury, or any thing else that is concerned in the administration of justice, so impartial, as to have a commission fairly executed there, or indeed any other proceedings in the courts of law fairly executed between these parties. I think I must be permitted to say, that on an allegation of that kind, it would be quite impossible for any court of justice in this country to proceed at all.

I cannot see what difference there is between one indictable offence and another indictable offence. I have here those cases which have been alluded to at the bar. I mean the case of *Davie v. Verelst*, and two others, in which it appears to have been clearly the opinion of the courts below, and the opinion of your Lordships House, that although the matters of allegation amounted to indictable offences, yet if the parties thought proper to bring actions, the Defendants in respect of facts which happened abroad, would be entitled to have commissions to examine witnesses, and the fact that the circumstances alleged applied to indictable offences which unquestionably they did, was not a fact which this House thought ought to repel the right to the common defences in civil actions, as those defences were either to be made in a court of law or a court of equity.

It is very true that the House proceeded differently in those cases which are related in the books I now have in my hand, but then they did not proceed differently in respect of the general principle on which they decided the cases, but they proceeded differently on the different circumstances of each: in both cases, as it appeared to me, acknowledging

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the general right of the subject to conduct his defence in the way I have stated, in case the party thought fit to proceed by way of civil remedy. I will read to your Lordships the reasons assigned in one of those cases, by way of explaining the view which was taken of this question. It may not be improper to preface the reading of them, by stating that it seems to have been some time ago the notion that a court of common law could not award these commissions abroad; and indeed now the law upon that subject stands in a very singular state, because if a plaintiff brings an action against a defendant, in the Court of King's Bench, and if that defendant wants a discovery, he must, of course, go to a court of equity. If he wants a commission to examine witnesses, he must likewise go to a court of equity, unless the plaintiffs will consent that he shall have such a commission, and if the plaintiff will not consent, the mode which that court has thought proper to adopt, is to say, your cause shall not be tried, till you do consent; that is the mode in which they make a volunteer of a man.

What the state of the law was, at that time, in a court of equity, as laid down in this book,* I think may be pretty well ascertained from the case of *Davie v. Verelst*, as it was stated by Lord Thurlow, then Attorney General, and by Mr. Madocks, whom some of us remember as a pleader very well versed in equity. The order was for a commission abroad, and so on, and the reasons in support of it are these: "The order appealed from, proceeds upon a fundamental maxim in the administration of justice, namely, that both sides are to be heard, and the parties are to be heard by their evidence and wit-

* The printed cases in D. P.

" nesses to matters of fact. The end of the order in
 " question, which was for a commission, is to give
 " the Respondents an opportunity of bringing over
 " their evidence from a foreign country, to maintain
 " the truth of the justification which they have
 " pleaded; the courts of law pay an attention to
 " *audi alteram partem*, as far as the powers of a court
 " of law can go, and therefore will put off trials,
 " upon an affidavit made by the Defendant, showing
 " that he has material witnesses abroad, who are
 " expected home in a reasonable time, it not being
 " the fault but the misfortune of the party, that his
 " witnesses are not within the reach of the process
 " of the Court, whereby their attendance on the trial
 " may be compelled. This reasoning goes only to
 " the putting off the trial where there are witnesses
 " abroad who are expected to be here in a reason-
 " able time, and not when the witnesses were not
 " expected to be here, and their testimony was to
 " be sought by sending a commission to them instead
 " of waiting for their coming home here to be ex-
 " amined; but where witnesses reside abroad, and
 " cannot or will not personally attend in England,
 " the power of the courts of law is at an end, as
 " they have no means of examining witnesses
 " abroad; but the Court of Chancery having an
 " authority to issue commissions, under the great
 " seal, for various purposes, and amongst others for
 " examining witnesses in causes in that Court, the
 " suitors Defendants at law have availed themselves
 " of the power of the Court of Chancery to come in
 " and supply the failure of justice, by preferring
 " their bills there, containing a state of their case,
 " and of the proceedings at law, with the Defendants'
 " misfortune that their witnesses being resident

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“ abroad, and not compellable to appear at the trial,
 “ they cannot have the benefit of their testimony;
 “ and therefore praying that the Court will relieve
 “ them against this accident, and grant them a com-
 “ mission for the examination of their witnesses, to
 “ the end that their depositions may be read at law;
 “ and as it would be nugatory to try the cause without
 “ evidence, praying also that the Plaintiff at law may
 “ be restrained, by injunction, from proceeding in
 “ the meantime, till the return of the commission.
 “ Both the Court of Chancery and of Exchequer, as
 “ courts of equity, have always entertained these
 “ bills as belonging to one of their great sources of
 “ jurisdiction, the relief against such accidents as
 “ are beyond the power of courts of law to aid.”
 (Now if the courts of law assume to themselves
 a power to interfere, I believe I may venture to say,
 that that is no ground for destroying the more
 ancient jurisdiction of the Court of Chancery; there
 are many instances in which the courts of law main-
 tain actions on equitable principles.) “ But as such
 “ applications occasion a delay to the Plaintiff at
 “ law, therefore courts of equity have regulated the
 “ practice of issuing injunctions, in such cases, with
 “ great care and caution. The injunction issues if
 “ the Plaintiff at law delays appearing to or answer-
 “ ing the bill beyond the periods allowed by the
 “ Court;” (and I will just observe in passing, that
 it is one thing to put in an answer to such a bill, and
 quite a different thing to file an affidavit, because
 there is no man who does not know that to answer
 a great many questions put to him, is not quite so
 easy an operation as to make an affidavit, stating
 what he is pleased to state, without having any
 questions asked of him;) “ because it is unjust that

"he should take advantage of his own contumacy
"or delay to distress the Defendant."

Then he proceeds to state, "policies of insurance
"have afforded numberless occasions for the exer-
"cise of this jurisdiction in courts of equity, where
"the underwriter being sued upon a policy made
"upon a ship in foreign parts, has discovered a
"fraud in the policy by misrepresentation of the
"true state of the ship at the time, but cannot show
"the fraud in proof, because his witnesses are in
"foreign parts; and many other foreign transactions
"have afforded like occasions, so that the use of such
"bills has been long established, and the increase
"of commerce has augmented their use."

Now I believe no lawyer of any experience in the
Courts of Westminster Hall, particularly of pro-
ceedings in the Exchequer with reference to mat-
ters of this kind, can hesitate for one moment to say
that, in many cases, there have been indictable
offences stated as the grounds of defence against
policies of insurance, frauds which might have been
the subject of indictment. What the Courts have
said is this: If you do not choose to indict for those
frauds, you make it a civil action to all intents and
purposes; and if that be true as to one species of
indictable offence, it does not appear to me on what
ground it is not true as to another species of indict-
able offence. Cases must arise from time to time
which are new cases in specie, but which are not
new cases with respect to the general principle by
which they must be decided. With reference to
these cases in the Exchequer, a very learned Counsel
stated at your Lordships' bar, that they were so
familiar that they have a sort of repository or pigeon-
hole, I think he called it, out of which a sort of

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form or precedent was drawn, and the bill might be all false from the beginning to the end ; but still the Court proceeded upon it. Whether that way of filing a bill should or should not be approved or disapproved is one question ; but the fact that the courts of equity, which have not been informed how those bills have been framed, always act upon those bills, only tends to make the precedent the stronger, to show that courts of equity will act where there are allegations of that kind made, which those courts must suppose to have been properly made until the contrary is shown. Upon the whole, therefore, it does appear to me, that it is impossible to distinguish this case from other cases of indictable offences where this species of remedy has been given in courts of equity.

I do not enter here into the consideration whether there have not been too many questions asked upon this bill ; * whether there have not been questions asked upon this bill that may not perhaps be quite pertinent to the business in hand ; nor do I now enter at all into the consideration whether the commission granted should or should not be more or less limited either as to the subjects into which those are to inquire who are authorized by that commission to make inquiry, or whether there should or should not be a limitation in point of time within which the commission is to be returned ;

* Upon the hearing in the Court below, the Lord Chancellor, in giving judgment, alluded to a passage in Mr. Phillips' *Law of Evidence* (p. 289), in which is discussed the rule of the courts of common law, as to putting a question to a witness, tending to degrade his character : the Lord Chancellor said, " he disapproved of the practice of leaving the witness to refuse to answer such question, and directing or permitting the jury to draw, from his silence, an inference unfavourable to his character.

because all those matters I apprehend may be adjusted by application to the Court below; and the Courts below are in the constant habit of regulating those things as justice may require. But to say that the remedy which is given in other cases shall be withheld entirely in this case is a proposition to which I certainly could not feel myself authorized to assent in giving judgment in the Court below. On the best consideration I have been able to give this case, I can see no reason for thinking that that judgment was wrong in its principle; and I have the satisfaction to know that the Noble and Learned Lord to whom I allude, has certainly not been able to introduce into his mind so much of doubt as I have introduced occasionally, in considering this case, into my mind; but which certainly has been removed from that mind by the consideration and attention I have given to the subject. I shall therefore propose to your Lordships, on the usual questions being put, that this judgment be reversed, to say not content; which, if adopted by the House, has the effect of affirming the decree below.

I should be sorry to part with this case without saying, that I desire that it may be understood, that nothing which falls from me is to be considered as stating any opinion of mine with respect to the truth of one word that is contained in this publication. The simple question before us is this: *A.* having brought an action, and *B.* having justified by pleading that what he has stated in his publication is true, the simple question is—Is *B.* entitled to the ordinary means of proving the truth of his pleas of justification? The case, I think, may be simply so put. I am now speaking at the close, perhaps, of a very

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long judicial life; and certainly at a period very much advanced in my professional life. And I take upon myself to say, that I do not know any thing more incumbent upon Counsel and upon Judges, than to take care to confine their observations to the cases before them, both in pleading and in judgment, in such a manner as to affect the character and honor of parties as little as possible, and as the circumstances of the case will admit. I will take the liberty to add, that that must be done on the part of the Judge without favor; and it is a singular thing, that the person who has now the honor to address your Lordships, and whose anonymous correspondence may be called Legion, has received a letter of admonition from some such correspondent; which letter of admonition informs him, that all the men of eminence at the bar think that this decision is wrong, and that it is produced by the affection which the Lord Chancellor is supposed to have had for some Mr. Shackell, or some such gentleman. I wish my anonymous correspondent would be so good as to give me his name, and I think I could satisfy him that I have never disgraced myself by any partiality towards any suitor whatever. Why I should do it in this particular case is to me a mystery,—it may be otherwise to him. Had he given me an opportunity of answering his letter in another way, I should have done so; but I can only answer it in this way by assuring him, that if he had made any such assertion I should have been entitled to have proved that it was a libel; but if I had complained of that as a libel in a civil action, I should certainly have said that he was very well entitled to file a bill of discovery, and to have had a commission to examine his witnesses abroad; for

I do not believe he would have found one in the country in which I have the honor to administer justice, knowing what had been my practice, who would have confirmed by his testimony a slander so base as that is.

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The only question remaining is, whether in this case your Lordships should give costs. Now it is a case that in its particular kind is new, and on that ground I do not recommend to your Lordships to give costs.

Judgment affirmed.

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ENGLAND.

(COURT OF KING'S BENCH.)

JOHN POULETT, Administra- } Plaintiff in Error,
tor, &c. - - - - - }

AND

GEORGE WIGHTMAN, - - - Defendant in Error.

The Defendant in an action having died intestate after interlocutory judgment, and a writ of inquest of damages executed; but before it was returned, the Plaintiff declared in *scire facias* against the administrator, who pleaded *plene administravit*, and set forth in his pleas divers specialties due and owing from the intestate, and charging the estate. The Plaintiff having replied, admitting the truth of the pleas, and praying judgment and execution of the goods of the intestate *quando acciderint*, entered up final judgment, "to have execution against the Defendant as administrator according to the force, form and effect of the said recovery;" no recovery having been before stated in any part of the proceedings on the record, and no final judgment having been given in the original action, and no provision being made by the judgment for the payment of the specialty debts.—*Held* that the judgment was erroneous, and it was reversed with costs.

GEORGE WIGHTMAN, in Michaelmas term, 1811, commenced an action of trespass on the case upon promises against the Honourable Vere Poulett, since deceased, by original writ of *Capias ad Respondendum*, returnable in the King's Bench, to recover damages against him for the non-performance of the several promises and undertakings whereof George Wightman in the declaration in that suit complained, and such proceedings were thereupon afterwards had in Hilary term then next, that it was considered by the Court that George Wightman ought to recover his damage on occasion of the non-performance of the said several promises and undertakings, and thereupon afterwards in that same Hilary term

a writ of inquiry of damages, directed to the Sheriff of Middlesex, was issued out of the Court returnable, &c., commanding the Sheriff by the oath of twelve, &c., to inquire what damages George Wightman had sustained, as well by means of the premisses as for his costs, &c. After interlocutory judgment had been so given and the writ of inquiry of damages awarded, and also after the execution thereof by the Sheriff but before the return of the writ, namely, on or about the 15th day of March, 1812, the defendant in the action died intestate, whereupon administration of the goods, &c., was granted to the Plaintiff in error. And thereupon George Wightman sued out a writ of *scire facias*, reciting to the effect hereinbefore set forth; and that although the damages of George Wightman had been assessed to a certain amount, to wit 1,800*l.* beside his costs and charges, yet that final judgment still remained to be given, wherefore it was commanded to the Sheriff that, &c., he should make known to the administrator, &c. To this writ the Sheriff returned *nulla bona* and *non est inventus*. Whereupon an alias *scire facias* issued, and the Defendant having appeared, the Plaintiff declared upon the *scire facias* in the usual form. To this declaration the Defendant pleaded *plene administravit*, reciting certain bonds and other debts by specialty to which the estate of his intestate as he pleaded was liable. The Plaintiff by his replication admitted the several matters pleaded to be true, and prayed judgment; and that execution might be adjudged to him, of the damages aforesaid, to be levied of the goods and chattels, which were of the said Vere at the time of his death, and which should thereafter come to the hands of the Plaintiff in error as administrator, to be administered according to the

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force, form and effect of the said recovery. And afterwards entered up final judgment in the following words:—

“ Therefore it is considered that the said George have his execution against the said John, as administrator as aforesaid, according to the force form and effect of the said recovery, and the said John in mercy, &c.”

Upon this judgment or award of execution, the Plaintiff in error brought a writ of error, returnable in Parliament, to reverse the judgment or award of execution, on the writs of *scire facias*, and assigned errors as follows:—

First—That it is in and by the said award of execution set forth and alleged, that it is considered by the said Court, that the said George have his execution against the said John as administrator as aforesaid, according to the force, form and effect of the said recovery, when in fact no recovery is previously stated in any part of the said proceedings, or the record thereof, to warrant the said award of execution.

Second—That although the said George prays the said award of execution, yet it doth not appear that any final judgment hath been at any time given in the original action.

Third—That by the record aforesaid, it appears that execution was awarded to the said George against the said John Poulett, as administrator as aforesaid, of the damages in the said writ of *sci. fa.*, mentioned according to the form and effect of a certain supposed recovery therein also mentioned, although no such execution ought to have been awarded, neither is there any thing in the said proceedings, or the said record thereof, to warrant such

award of execution to the said George against the said John Poulett, as administrator as aforesaid.

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Fourth—That by the record aforesaid, it appears that judgment was given that the said George Wightman should have his execution against the said John Poulett, as administrator as aforesaid, instead of such execution being awarded of the goods and chattels which were of the said Vere, at the time of his death, and which should thereafter come to the hands of the said John, as administrator as aforesaid.

Fifth—That it doth not appear in or by the said award of execution against the said John, as administrator as aforesaid, whether the said damages, whereof execution is so awarded as aforesaid, were to be levied of the goods and chattels which were of the said Vere, at the time of his death, and which should thereafter come to the hands of the said John, as administrator as aforesaid, to be administered after payment and satisfaction of the said specialty debts in the said pleas to the said writs of *sci. fa.* mentioned and set forth, or whether such damages were to be levied before payment and satisfaction of those specialty debts.

Sixth—That by the record aforesaid, it appears that execution was awarded to the said George of the damages in the said writs of *sci. fa.* mentioned, and which should thereafter come to the hands of the said John Poulett, as administrator as aforesaid, to be administered, no regard being had, in the said award of execution, to the debts by specialty, in the pleas to the said writs of *sci. fa.* mentioned, and to the previous discharge thereof.

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For the Plaintiff in error:—The Solicitor General.*

The proceedings, as detailed and set forth in the writs of *sci. fa.*, and the judgment and award of execution thereon, do not warrant such judgment or award of execution; on the contrary, such judgment or award of execution is illegal, and must manifestly work injustice to the Plaintiff in error: inasmuch as the legal effect and consequence thereof, is to fix him with payment of the amount of the damages mentioned in the award of execution, out of the assets which have, since such award of execution, come to the hands of the Plaintiff in error, as administrator, even though such assets may turn out to be insufficient to satisfy the specialty debts mentioned in the plea of the Plaintiff in error.

By the judgment and award of execution, the damages therein mentioned have precedence of the specialty debts enumerated and set forth in the plea of the Plaintiff in error, whereas the cause of action in the suit below being only a simple contract debt, the same did not constitute or create a charge on the estate of the intestate, legally entitled to priority over those specialty debts.

The judgment and award of execution of the damages ought not to have been framed in general terms, as against the future assets of the intestate, which after the giving of such judgment or award of execution should come to the hands of the Plaintiff in error, to be administered; but on the contrary such judgment and award of execution ought to have been confined to such assets as might come to the hands of the said Plaintiff in error, as administrator, after payment and satisfaction of the

* Sir N. C. Tindal.

specialty debts in the plea enumerated and set forth.

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No Counsel appeared for the Defendant in error; and at the conclusion of the argument for the Plaintiff in error, the Judgment was

Reversed, with 35*l.* costs.*

* It is contrary to the practice of the House to give costs on the reversal of a Judgment; but the Lord Chancellor gave them in this case, because the Court below had not the power to reverse the judgment, and the Plaintiff in error had no means of relieving himself but by writ of error to the House of Lords.

For this information as to the grounds of giving costs, I am indebted to Mr. Courtenay, the clerk of Parliament.

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ENGLAND.

(KING'S BENCH AND EXCHEQUER CHAMBER.)

BRICE WILLIAM FLETCHER - - - - - *Appellant*LEWIS RICHARD LORD SONDES - - - - - *Respondent*

A bond, reciting that the patron of a rectory had, by an instrument of the same date, presented an incumbent, that he had agreed to resign upon request of the patron, the owners of the advowson for the time being, for the purpose of enabling him or them to present one of the younger brothers of the patron, when capable of holding
Held, (reversing the judgment of the Courts of King's Bench and Exchequer Chamber) that such a bond is simoniacal and void, on the ground that such an agreement is a benefit to the patron, and contrary to the statute 31 *Eliz. c. 6.* (seem) the common law.

Held also, that from the recitals of such a bond, it must be intended that such presentation was made in consideration of the agreement to resign, and that it is not necessary to allege that fact in pleading.

THIS was an action brought by the Defendant in error, in the Court of King's Bench, against the Plaintiff in error, on his bond, dated on the 16th November, in the penal sum of 12,000*l.* The declaration was in the common form, not setting out the conditions of the bond. The Plaintiff in error suffered judgment by default, according to the statute 8th and 9th *William and Mary, c. 11*; whereupon the Defendant in error set out the conditions of the bond, alleging a breach of the condition, and praying a writ of inquiry to ascertain the truth of such suggestion, and assess the damages sustained.

by the Defendant in error. The condition stated upon the record recited that "Lord Sondes was the patron of the rectory of Kettering, which had become vacant by the death of the late incumbent; and that Lord Sondes, by writing under his hand and seal, bearing equal date with the bond, had presented Brice William Fletcher to supply the vacancy, and to be rector of the said rectory, in order that he might be instituted and inducted thereto by the proper ordinary; and further reciting that Brice William Fletcher had agreed to resign the rectory into the hands of the proper ordinary, upon such request or notice as thereafter mentioned, so as that the rectory might thereby again become vacant; to the intent, and for the purpose that the Lord Sondes, his heirs or assigns, or other the person or persons who should for the time being be the owner or owners of the advowson of the said rectory, might be enabled to present thereto anew either the Honourable Henry Watson, one of the younger brothers of Lord Sondes, or the Honourable Richard Watson, his youngest brother, when such of them to be so presented, should be capable of taking an ecclesiastical benefice." The condition was, that if Brice William Fletcher should, upon the request of Lord Sondes, his heirs or assigns, or other, &c., or upon notice in writing to be left for him, by Lord Sondes, his heirs or assigns, or other, &c., at the rectory or parsonage house of the said rectory, and within one month after such request made or notice left, absolutely and effectually resign and deliver up the said rectory and parish church of Kettering, with the appurtenances, into the hands of the proper ordinary or guardian of the spiritualities, for the time being, whereby or so as that the said rectory and parish

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church of Kettering should become and be absolutely vacant, and Lord Sondes, his heirs or assigns, or the person, &c., might be thereby enabled to present anew to the said rectory and parish church of Kettering, either the said Henry Watson or Richard Watson, when capable, &c. &c., then the obligation to be void, otherwise to be and remain in full force. The breach assigned was that Henry Watson, one of the younger brothers of the Defendant in error, on the 11th of October, 1820, became capable of taking an ecclesiastical benefice; that the Defendant in error was desirous that the Plaintiff in error should resign the living, that he might present the said Henry Watson, and requested him so to do, but that he had refused to make such resignation, to damage of the Defendant in error of 12,000*l*.

Upon this suggestion, a writ of inquiry was executed before the Chief Justice, and a special jury assessed the damages at 10,000*l*., for which judgment was entered up. Upon this judgment, the Plaintiff in error brought a writ of error in the Exchequer Chamber, where judgment was affirmed, without argument; whereupon a writ of error was brought in the House of Lords.

The case was argued with great learning and ability, by Mr. Shadwell and Spankie, Serjeant, for the Plaintiff in error, Bosanquet, Serjeant, and Pepys for the Defendant in error.*

After the argument the House directed the following question to be submitted to the judges:—
 “Whether sufficient matter appears upon the record to show that either by statute or common law, the bond upon which the action of the De-

* The points argued and the authorities cited are noticed in the opinions of the Judges.

pendant in error was brought in this case, and stated upon the record to bear equal date with the writing of presentation therein mentioned, is void or illegal."

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Upon this question the judges * not being agreed, gave their opinions *seriatim* :

Mr. Justice Gaselee (after stating the facts) proceeded as follows :—The ground of objection which has been taken to this bond is that it is simoniacal, and not only contrary to the statute of 31 *Eliz. c. 6.*, but, also, to the common law and public policy. But another question has been raised at the bar, whether, admitting this objection to be good, it can be taken advantage of in the present state of the record, or whether there should not have been a plea averring that the bond was given in consideration of the presentation? It will not be necessary to consume much time in the consideration of this question, because it appears to me to be impossible to read the condition of the bond without coming to the conclusion, that the bond was given in consideration of the presentation, and if so, it is unnecessary to introduce any specific averment of that fact.

I shall, therefore, confine my observations to the principal question, whether special resignation bonds, for the purpose of presenting particular persons when capable of taking the benefice, are legal, and whether the persons mentioned in this condition are such in whose behalf such a stipulation may be made? Of course I confine myself to special resignation bonds, because, since the case of *Ffytche* and the *Bishop of London*, which was decided in this House in the year 1783, I am precluded from con-

* Bayley, Holroyd, and Littledale, Judges, gave no opinion.

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tending that a general resignation bond can, under any circumstances, be supported. Before the determination of that case by this House, there had been many cases in which it had been decided by the courts below that general resignation bonds were upon the face of them good, and were not to be avoided except by plea showing them to have been originally made upon some corrupt contract not appearing upon the bond itself, or that an ill use was endeavoured to be made of them, by attempting to put them in force for improper purposes; in which latter case the remedy was an application to a court of equity for an injunction to restrain their being put in suit. It is true that in some of the cases before *Ffytche* and the *Bishop of London*, doubts had been thrown out as to the validity of general bonds of resignation, but in most, if not all the cases, special bonds for legitimate purposes, among which the presenting the patron himself, his son, or, (as one of the cases has it,) his friend, were held to be good. And it is surely quite evident that there is a manifest distinction between general and special bonds of resignation, in as much as, if the patron wishes to sell the advowson, it is much more valuable by means of a general bond of resignation, the purchaser can at any time compete for a vacancy. This cannot be in the case of a special bond like the present, but on the contrary, as in general the party intended to be presented is underage when the bond is given, the consequence of his being presented would be the putting in a younger life, which would generally render the advowson less valuable as an object of sale.

The first case with which I shall trouble your Lordships is *Johnes v. Lawrence*,* which is thus re-

* Cro. Jac. 248. See also p. 274.

ported by *Croke*, J., twenty-one years only after passing the 31st of *Elizabeth* :—" Debt upon an obligation of 1000 marks conditioned : whereas the obligee had procured from Queen Elizabeth letters of presentation to the church of Stretham, and was to present Lawrence, intending when his son John should be capable to procure another presentation of him to the said church, if the said obligor, within three months after his request, upon his presentation, admission, institution, and induction to the said church, should resign his benefice absolutely ; that then the obligation shall be void. The Defendant pleads that he was not requested ; and issue joined thereupon and found for the Plaintiff, and moved in arrest of judgment : First, that it appears by the condition of the bond to be a simoniacal contract, and against law, and therefore the obligation void, *sed non allocatur*, for there doth not any simony appear upon the condition. And such a condition is good enough, and lawful, wherefore it was it was adjudged for the Plaintiff. Afterwards a writ of error was brought upon this judgment in the Exchequer Chamber, and the principal error insisted upon was, that this condition is against law, for it appears upon the condition entered, that it was for simony, which makes the obligation void ; but all the judges of the Common Bench and Barons of the Exchequer held, that the obligation and condition are good enough ; for a man may bind himself to resign, and it is not unlawful, but may be upon good and valuable reasons, without any colour of simony : As to be obliged to resign if he take another benefice, or if he be non-resident for the space of so many months, or, as this case is, to resign upon request, if the patron will present his son thereto when he should be of age capable to

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take it. But if it had been averred that it was *per colorem simonii*; viz.—If he did not suffer the patron to enjoy a lease of the glebe or tithes, or if he did not pay such a sum of money, that had been simony, and it is possible might have made the obligation void. But as this case is, there doth not appear any cause to adjudge it to be void for simony; wherefore the judgment was affirmed.”

The doctrine in the case of *Johnes v. Lawrence*, was adopted and acted upon in the subsequent case of *Babington v. Wood*:* “Debt upon an obligation conditioned: whereas the Plaintiff intended to present the Defendant to such a benefice, that if the Defendant, at any time after his admission, institution and induction, at the Plaintiff’s request resigned the said benefice into the hands of the Bishop of London, that then, &c. The Defendant upon oyer of the condition, demurred generally. And this was argued by Grimston for the Plaintiff, and by Calthrop for the Defendant, who showed that the cause of demurrer was, for that the condition of the bond being to resign upon request of the patron, it is simony and against law; so the bond void. But all the Court conceived that if the Defendant had averred, that the obligation was made to bind him to pay such a sum, or to make a lease or other act which appears in itself to be simony, then upon such a plea, peradventure it might have appeared to the Court to be simony, and might have been a question whether such a bond for simony should be void: but as it is pleaded by way of demurrer upon the oyer of the condition, it doth not appear that there is any simony; for such a bond to cause him to resign may be good, and upon good reason and discretion required by the

* Cro. Car. 180. Hatt. 220. S. C.

patron, viz.—If he be non-resident, or takes a second benefice by a qualification, or the like; and a precedent was shown in octavo Jacobi, betwixt Johnes and Lawrence, where such a bond was made to resign a benefice upon request, when the son of Johnes came to be twenty-four years of age, to the intent that he might be presented unto it: and it was adjudged good in the King's Bench, and affirmed on a writ of error in the Exchequer Chamber, and of this opinion was all the Court; whereupon judgment was given for the Plaintiff. Hatton, who reports the same case, says, that upon error brought in the Exchequer Chamber the judgment was affirmed (*Jones*, 220. *S. C.*) accordingly, and that it was affirmed in error upon viewing the precedent of *Johnes v. Lawrence*."

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In that case it does not appear that the condition of the bond was to resign in favour of any particular person, but generally; but it is obvious that the case turns mainly upon *Johnes v. Lawrence*, which it treats therefore as an express authority.

In an anonymous case, reported in 3 *Mod.* 54, in which a general bond of resignation was held good, although Mr. Justice Powel states his opinion, "that when first the judges held these bonds good, if they had foreseen the mischief of them, they would have been of another opinion." Yet he considers that the patron having a son of his own, who may be capable of a benefice, it is an honest intent: and Justice Blincow says, "Here is a particular circumstance why it should not be thought simony; because it is a sum much above the value of the benefice: if indeed it had been for a sum of less value, it might be intended perhaps that the parson would rather pay it than resign:" and be it remembered,

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Justice Twisden said, "he had known such a bond held good twelve times; so it would be hard to oppose it now, there appearing no simony in the condition, and the Defendant not averring any."

What proportion the penalty in this bond of 12,000*l.*, bears to the value of the living does not appear; but it must be taken for granted the bond was bona fide given for the purpose mentioned in the condition. If it were really colourable, and the real intention was that there should be no resignation, but that the patron should receive the penalty, it should have been pleaded, and that might have altered the case.

The case of *Hilliard v. Stapylton* * is thus reported: "The guardian of an infant presented to a living, and took a bond from the incumbent to resign within two months after request of the patron or his heirs, it being designed that he should have the living himself when capable. The patron afterwards died an infant at the University, leaving two sisters his heirs, who pressed the incumbent to resign, and for not doing it, put the bond in suit, and recovered judgment; and this bill was brought to be relieved against the bond and judgment. And it was proved in the cause that they had treated with the incumbent to sell him the perpetual advowson, and had said that if he would not give 700*l.* for it, they would make him resign. The Lord Keeper said, the proof in this case lies on the Defendants' part, and unless they make out some good reason for removing him, he should certainly decree against the bond. Bonds for resignation have been held good in law. The statute of 31 *Elizabeth* against simony, made the penalty upon the lay patron; and he did not remem-

* Equity Cases abridged.

ber any case of resignation bonds before that statute, and they have been allowed since only to preserve the living for the patron himself, or for a child, or to restrain the incumbent from non-residence or a vicious course of life; and if any other advantage be made thereof, it will avoid the bond: and where it is general for resignation, yet some special reason must be shown to require a resignation, or he would not suffer it to be put in suit. If it should not be so, simony will be committed without proof or punishment. A particular agreement must be proved to resign for the benefit of a friend who would be presented, and without such agreement the bond ought not to be sued, but for misbehaviour of the parson, and here are proofs in this case of endeavours to get money out of the Plaintiff: and he decreed a perpetual injunction against the bond, and satisfaction to be acknowledged upon the judgment, and the Plaintiff to give a new bond, of 200*l.* penalty, to resign, but that not to be sued without leave of the Court."

It is difficult to say why there should be a new bond, the party intended to be presented being dead. And in *Ambler*, 268, the Lord Chancellor is stated to have said, that the Lord Keeper went too far; but I cite the case to show that there was then no idea that a bond to resign, for a son or even a friend of the patron to be presented, was illegal; the only ground of applying to the Court of Chancery being the "ill use that had been made of it."

So in *Peele v. Capel*.* Capel, on presenting Peele to a living, took a bond from him to resign when the patron's nephew came of age, for whom the living was designed. When the nephew was of

* 1 Strange, 534.

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age, instead of requiring a resignation, it was agreed between them all that Peele should continue to hold the living, paying 30*l.* per annum to the nephew. Peele makes the payment for seven years, but refusing to pay any more, the patron put the bond in suit, and then Peele comes into the Court for an injunction, and to have back his 30*l.* per annum. On the hearing the Chancellor granted the injunction, not (as he said) upon account of any defect in the bond itself, which he held good, but on account of the ill use that had been made upon it. And as to the money, it being paid upon a simoniacal contract, he left the Plaintiff to go to law for it.

These are all the cases respecting special resignation bonds which I have met with before the decision of *Ffytche v. the Bishop of London*. I proceed now to those which have arisen during the succeeding period of forty-three years. The first is *Bagshaw v. Batley*,* which was an action on a bond given by the Defendant on his appointment to the curacy of the free chapel of Wormhill, in the county of Derby, which, after reciting that the Defendant had agreed to be constantly and duly resident at the curacy house there: and in default of such residence, to resign and deliver up the curacy within one month after request or notice in writing, left at the curacy house, so that the patron might present anew, was conditioned for such resignation, in default of such constant and due residence, so that the patron, the obligee, might present anew, discharged of all charges and incumbrances done and suffered by the obligor, and for the not committing wastes or dilapidations upon the houses or

* 4 Term Reports, 78.

lands belonging to the curacy. To this the Defendant pleaded several pleas: 1st. That he had resided at the curacy, and had not committed or suffered wastes or dilapidations. 2dly. That after his appointment to the curacy, he had a general license from the obligee to reside elsewhere. Replication: 1st. That the Defendant voluntarily absented himself from the 7th day of April, 1790, to the 8th of April in the year following, and that the Plaintiff had given him notice to resign, which he had refused to do. 2dly. That after the time when the supposed license was granted, viz. on 7th April, 1790, the Plaintiff countermanded and revoked the license, and that the Defendant absented himself, &c. as in the former replication. To both these replications there was a general demurrer. Sutton, in support of the demurrer, contended, first, that the bond was illegal and void; and secondly, that the license was general, and could not be revoked. First, the bond is illegal, because it placed the incumbent under the undue control of the patron, after the presentation, and after the relation between them had ceased, and a new relation had sprung up between the incumbent and the ordinary, to whom only he owed obedience. The right of presentation in the patron is a public trust, and not a mere private interest. The duties of the incumbent are prescribed by the municipal law, and the canons and ordinances of the church, and therefore it was not competent to the patron to impose any private condition of his own creating beyond those which the civil and ecclesiastical law have deemed it necessary to require. With respect to the residence required by the bond, that is carried much further than the law requires it, for the

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statute of Henry VIII. only imposes certain penalties, much inferior to that imposed by this bond for non-residence: and besides, there may be various defences to an action on that statute, as amongst others residence upon another living by dispensation, whereas there can be no excuse under this unless the license of the patron be such. And further, in this case the living itself is to become vacant: again too in this case the penalty is to become due to the patron, in case of dilapidations, in which he has no sort of interest, that being but the sole concern of his successor. The effect, therefore, of this bond, is to raise to the patron a special interest in the exercise of a public trust, which by law he was not invested with.—Chambre, *contra*. was stopped by the Court.—Lord Kenyon said, I cannot bring myself to entertain a doubt upon this case. It has been argued that the patron's right of presentation is a mere trust; it is so to some purposes, but not to all. It is a trust coupled with an interest, for it is a subject of a conveyance for a valuable consideration, which is not the case with a naked trust. As soon as the Defendant was presented to the living, he was bound to take upon himself all the duties of an incumbent; to reside upon the living, to take upon himself the cure of souls, and to keep the house in proper repair: now this bond was only entered into for the purpose of securing a performance of all these duties, which by law, and without the bond, he was bound to discharge. I avoid saying any thing respecting the case of the *Bishop of London v. Ffytche*: when that question comes again before the House of Lords, they will, I have no doubt, review the former decision, if it should become necessary. It is sufficient for me, in decid-

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ing the present case, to say, that it cannot be governed by that, for here the Plaintiff does not call for the resignation of the incumbent, but merely for a performance of those duties which in morality, religion, and law, he ought to do. I am therefore clearly of opinion, that a bond for the performance of these duties is not illegal.—Justice Buller said, I cannot find any immorality or illegality in this bond. It is the duty of the incumbent to reside on his living, and to be regular in the discharge of his duties. Now this requires nothing more: it only requires him to do what the law would have compelled him to do without it. Justice Grose was of the same opinion. Ashurst was absent.

Although in this case the bond was not for resignation to the patron, or to any relation, on his becoming capable and desirous of taking it, yet it amounts to a decision of the Court, that the giving of a special bond of resignation is not in all cases illegal.

The next case was precisely in point with the present. It is *Partridge v. Whiston*.* The condition of the bond, after stating the presentation of the Defendant to the rectory of Cranwick and the vicarage of Methwold, in Norfolk, recites an agreement to be personally resident in one or other of these parishes, or in Northwold, which is contiguous to both, without absence for eighty days in any one year: to serve the cure of these two parishes himself, if his health would permit; and not to serve the cure of any other parish while he held those: that as the two livings together were a comfortable provision for one clergyman, though neither of them separately was such, the Defendant had agreed

* 4 Term Reports, 359.

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never to resign one without the other: that the Plaintiff had a son about fourteen years of age, who probably would take orders, and might be desirous of taking these livings; and therefore the Defendant had agreed, in that event, to resign both the livings, upon three months' notice to be given by the Plaintiff, in order that the Plaintiff's son might be presented thereto: the bond was conditioned to perform this agreement, and to keep in good repair the rectory house and chancel of Cranwick, and the vicarage house of Methwold. The Court, understanding that it was intended to carry this case up to the House of Lords, gave judgment for the Plaintiff, without hearing any argument. They said, as this case was not precisely similar to that of the *Bishop of London v. Ffytche*, they were bound by the established series of precedents to give judgment for the Plaintiff. I do not find that the case was ever carried further.

The next case is not one for a resignation bond with respect to an ecclesiastical benefice, but I cite it for the purpose of showing the opinion of Lord Kenyon on the point now in question. It is the case of *Legh v. Lewis*,* where the patron of a school had taken a general resignation bond on the appointment of the master. Lord Kenyon said, in the instance of ecclesiastical livings, every rector has a freehold in his rectory; yet it was never doubted but that resignation bonds for certain purposes, and up to a certain extent, at least, were binding, though they put an end to the freehold.—*Justice Lawrence* doubted whether the appointment could be made otherwise than for life; but he says it is true that a bond may be taken to enforce the observance of

* 1 East, 391.

those duties which by law are required to be performed by the appointee of an office, but then it should be so expressed in the condition.

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In 3 *Bosanquet* and *Puller*, 231, this case is reported in the Exchequer Chamber, and judgment affirmed without argument, it not sufficiently appearing on the record that the office of school-master was such as ought to be deemed a freehold office.

In *Newman v. Newman*,* upon a bond to pay certain sums of money on the conveyance of an estate, having an advowson appurtenant, to the obligor; and in case a living should become vacant during the life of the son of the obligee, and he should be qualified, to present him; and if he should be under age, and it should be necessary to present another, to procure such other to resign when the son should be of age; it became unnecessary to decide whether the latter part of the condition was good.—Justice Le Blanc says, the reason for making an exception in favour of a condition for presenting a son might be because it was not for a money consideration.—Justice Dampier says, if a bond to resign in favour of a particular person were necessarily void, the objection would have been good in *Johnes v. Lawrence*; but a stipulation to resign in favour of a specified person, does not seem to be open to the same objection as if it were to resign generally, because the latter makes the incumbent but a mere tenant at will to the patron. I know that since the case of the *Bishop of London v. Efytcbe*, it has been considered that bonds to resign in favour of specified persons are not illegal.

In *Lord Kirkcudbright v. Lady Kirkcudbright* †, a

* 4 Maule and Selwyn, 66.

† 8 Ves. 51.

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bond was given to pay 100*l.* a year until the obligee should be instituted and placed in possession of a living in the Church of England, then to pay him so much as with the value of the living shall amount to 150*l.* There was also an agreement by Lord Kirkcudbright to enter into orders and take the living, and if he did not the bond was to be of no avail. The obligor having died intestate, the obligee filed a bill praying an account, and that the arrears of his annuity might be paid him. "The Lord Chancellor expressed great doubt as to the validity of the bond: observing, that it was void on many accounts; it is," he says, "a corrupt agreement for taking holy orders such as the Court ought to decree to be delivered up. The policy of the ecclesiastical constitution of the country requires, that a man should take orders without any reference whatever to considerations of that nature. There is no objection to the bond itself except as connected with this agreement at the same time for a pecuniary consideration to take holy orders. — Another objection to the bond is, that the father is put under these circumstances, that he is to solicit the benefit of patronage for this pecuniary consideration moving from himself; the policy of the law supposing the patron to look for persons the best that can be recommended to him, which excludes pecuniary considerations. The cause stood over in order that this point might be considered. It was ultimately decided that the obligee had not performed the conditions, inasmuch as he had only taken deacons' orders, and had not answered whether he meant to enter into priests' orders. That case contains no decision upon the validity of special resignation bonds, though the Lord Chancellor, speaking of resignation bonds in general, states himself to have

no doubt that they were generally against the policy of the law, and says, that the question of their legality would never have perplexed him if there had not been so many authorities."

Another case has been referred to in the argument,* where a bond of resignation had been given in favour of a particular individual and not to accept a bishopric. The application was for an injunction, principally on the ground that the bond as to the resignation which had been given in consequence of supposed directions in a will, had been so given by mistake, it having been afterwards discovered that it was intended by the testator that the party should be presented without any such obligation. The Lord Chancellor said, it was very difficult, upon the pleadings in the *Bishop of London v. Ffytche*, to reconcile the distinction between general and particular bonds of resignation with the principle on which the House of Lords made that decision; but, he adds, "it would not however become me, having regard to what is the present state of the law on this subject, to interpose in a court of equity on the ground that this is a particular bond of resignation, although I agree that this Court, if it has a concurrent jurisdiction, is not bound to wait for the decision of a court of law, yet reasonable caution requires a court of equity not hastily to pronounce bad a bond understood to be good at law, and it would at least be proper to leave that question to be reconsidered at law. The injunction was refused.

The last case to be found on the subject is *ex parte Rainier, Rowlatt v. Rowlatt*.† The father, on the marriage of his son, gave a bond to trustees, *inter*

* *Dashwood v. Peyton*, in 18 Ves. 27.

† 1 Jacob and Walker, 230.

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alia, for performance of a covenant in the settlement, whereby he covenanted, that until the son should become the actual incumbent of the rectory of North Benfleet, or should be in the enjoyment of some other benefice or ecclesiastical preferment which he might hold during his life, of the yearly value of 600*l.* at the least, or until his death, he would pay him an annuity of 200*l.* The father became a bankrupt; the petition was presented by the son and his trustees to prove in respect of the bond. It appeared that the son had been presented to a living of 600*l.* a year, but had given a bond to resign in favour of two sons of the patron, when either of them should be qualified and willing to be presented to it, and instituted and inducted. The eldest son took orders, and the living was in consequence resigned within two years after the presentation. It was contended, that the son having been presented the condition was satisfied; on the other hand, it was said, that having been presented on a condition to resign and a bond given to that effect, it was a benefice that could not have been retained for life. The Lord Chancellor said, still he might have held it for life, he might if he chose have kept the living and forfeited the bond; you may, however, if you like, take a case into the Court of King's Bench. The reporter says, the matter stood over for the Plaintiff to consider whether they would take a case, which they afterwards accepted, but it is understood that they have since declined to persevere in it.

I apprehend that case could only have been directed upon the ground that the Court of King's Bench might have held the bond legal; for if it was simoniacal, the party could not have held the living, even if he had paid the penalty. For the presenta-

tion would have been absolutely void, and consequently not a satisfaction of the condition.

I have now gone through all the cases I can find respecting special resignation bonds, extending over a period of 200 years ; in none of which has such a bond been held bad ; in many it has been expressly determined to be good, and admitted to be so in most of those in which validity of general bonds of resignation has been disputed or denied. In one or two of the latest cases, indeed in the Court of Chancery, it has been stated to be very difficult upon the pleading in the case of the *Bishop of London v. Ffytche*, to reconcile the distinction between general and particular bonds of resignation with the principle on which the House of Lords made that decision. The main principle upon which the decision proceeded, appears to me to have been the enabling the patron to have made a greater profit on the sale of the advowson, and the converting the tenure of the incumbent into a tenancy at will. This I have already stated not to be applicable to the case of a bond to resign in favour of a particular person. The only objection applicable to a special in common with the general resignation bond appears to be the reducing the tenure from an absolute freehold for life to one for a less period, but however that might be available if the objection had been made for the first time, the practice as to special bonds appears to have been too long acted upon and acquiesced in now to call it question.

Under these circumstances, therefore, can a court of law now adjudge that they are bad ; particularly when it is considered that the consequence of holding them to be so must be to submit to two severe penalties those who have been acting upon a practice

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of upwards of two centuries, and which has never yet been declared illegal, and in many instances expressly determined to be legal? Those penalties, if the bond be considered as illegal, under the statute of Elizabeth, extending to the forfeiture of the presentation and two years' value of the benefice.

The provisions of the statute apply "to any person, &c. who shall present or collate for any sum of money, reward, gift, profit, or benefit, whatsoever, directly or indirectly, or for or by reason of any promise or agreement, grant, bond, covenant or other assurance of or for any sum of money, reward, gift, profit, or benefit, whatsoever." It is not contended that this case comes within any of the words of the statute except the word BENEFIT, and it is said that a resignation bond in favour of a son is a benefit to the father, inasmuch as it relieves him from making any other provision for him, which he would otherwise be bound to do. To this I answer, that this is not the species of benefit which the statute contemplated. A general resignation bond may be so, as I before stated, as it enhances the value of the living if sold during the incumbency, and amounts to a sale with the means of procuring an immediate vacancy. But if this be so considered, it would be equally a benefit when the father presents the son on a fair vacancy, or even where he presents himself; in either case it may be said he makes the presentation a means of providing for an expenditure he must necessarily incur; and therefore, circuitously, at least, a source of profit to himself. The statute has never yet been intended to operate to that extent; and the observation made at the bar, that upon looking at the 8th section the word benefit must be taken to mean a pecuniary benefit, and that the two

clauses ought to have a similar construction, appears to me to be entitled to considerable weight.

It might perhaps be urged, that in this case it does not appear that the patron was bound to provide for his younger brother, and therefore it can be in no sense a benefit to the patron, which it is but fair to consider the meaning intended by the statute to be applied to the word benefit, coupled as it is with the words sum of money, reward, gift, or profit. But it seems to me to be sufficient to say the act has never been held to extend to bonds of this description; that, on the contrary, they have been uniformly held good in Westminster Hall, and that it would be contrary to the principle universally acted upon with respect to penal law, viz. that they are to be strictly construed, now to extend it to them.

But it is asked, admitting a resignation bond in favour of a son to be good, to what degree of relationship and to what number of persons is it to extend? To this I answer, that it must, like many other cases, depend upon what shall be considered reasonable. With respect to the present case, such a bond, in favour of a more remote degree of relationship than a brother has been held good; for in the case of *Peele v. Capel*, before cited, the bond was in favour of a nephew; and in *Rowlatt v. Rowlatt*, where the bond was in favour of two sons, when either of them should be qualified, no objection was taken on that ground; but, on the contrary, a presentation, accompanied by such a bond, was considered as a satisfaction of the condition to pay an annuity until the party should be in the enjoyment of a benefice which he might hold for his life. It is also to be observed that the statute of Elizabeth is not confined to bonds and securities, but extends to

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any promise, agreement, grant, bond, covenant, or any other assurance. If therefore the bond in this case is illegal, and avoids the presentation, the same rule applies to every verbal promise or honorary engagement, expressed or perhaps only implied, surely then it is necessary to pause before a decision is adopted, which may, in its consequences, involve in the guilt of simony and the penalties of the statutes, parties, than whom none would be more abhorrent from such an offence, into whose contemplation it could never for a moment have entered that they were acting illegally, in making or accepting resignations, under circumstances sanctioned by the practice of centuries and the current of legal decisions, and who, from their peculiar station in society, would have been the last to put themselves in the smallest hazard of having it imputed to them for an instant, that they had concurred in or lent their sanction to any act, of the legality or propriety of which a doubt could be entertained.

Another objection taken to these bonds, is the oath upon institution, but this seems to me to be begging the question. The oath is—"I do swear that I have made no simoniacal payment, contract, or promise." Now, before the giving of such a bond can be considered a breach of the oath, it must be determined that such a bond is a simoniacal contract. Bishop Gibson* contends that this oath, whether interpreted by the plain tenor of it, or according to the language of former oaths, in the notions of the catholic church, concerning simony, is against all promises whatsoever; and he states that in the year 1391, in Archbishop *Courteney's* decree against *choppe churches*, the oath is—"Quodque obligati

* Codex p. 802.

non sunt, nec eorum amici pro se, juratoriâ aut pecuniariâ cautione, de ipsis beneficiis resignandis vel permutandis." But I should conclude, by the omission of this part of the oath in the canons of 1603, it was intended that it should no longer be included, or at least that it was considered as not being included; for in the Irish canons, which were made thirty-one years afterwards, it was provided that if any clerk or other, with his consent, should seal any bond, or sell to any person or persons, with condition of resignation of his benefice, he shall be holden guilty of simony, and proceeded against according to the severity of the ancient canons in that behalf.

As another ground of objection to these bonds, it is asked what power is there after the resignation made, to compel the patron to present the person in whose favour it is made, or to compel such person to accept it, or having been instituted, to prevent his resigning the benefice to a vendee immediately afterwards? And it is said that neither the Bishop nor the Chancellor can compel such presentation to be made. To this I answer, that the resignation is to be made to the Bishop. Upon its being tendered, he has a right to inquire into the reason of it, and upon finding it is the consequence of a resignation bond, or any other engagement to resign, he may say he will not accept the resignation, unless the patron comes at the same time prepared to make the presentation: where the party who presented is under age, at the time when the engagement is entered into, and as soon as he comes of age procures himself to be admitted into priest's orders, it is a pretty strong proof of his readiness to accept the living. With respect to the second part of the offer to resign the living immediately, or within a very

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short time after institution, is a pretty strong proof of the resignation being obtained from an interested motive, and would probably induce the Bishop not to accept it. But the legality or illegality of the bond cannot depend on what course the Bishop would pursue, and the probability is that he would not refuse to act according to what the courts of law had decided upon the question. If any real inconvenience should be found, it would be in the power of the legislature to enact that the resignation shall be conditional only, and be void if the persons in whose favour it is made be not presented within a certain period. It certainly has been determined that the party does all he can to comply with the condition, by tendering his resignation; yet if the Bishop refuses to accept it, the bond is forfeited. But upon this I would observe, that if where the incumbent has done all he can to perform the obligation, the bond is still put in suit, it can only be for an unlawful purpose: in that case I apprehend a court of equity would grant an injunction.

To the observation that it may be difficult or impossible to ascertain the fact; the answer is, that if there is any suspicion respecting it, a bill in equity may be filed for a discovery, and if the discovery does not render the party liable to penalties, it will be ordered. This was done in the case of the *Bishop of London v. Kfytche*,* and it is remarkable, that the noble and learned lord, who so ably, and so successfully, combatted the legality of resignation bonds, while he was in the profession, adopted the doctrine of Westminster Hall, and had, in that very case, over-ruled a demurrer which had been pleaded, on the ground that a discovery might expose the parties

* 1 Brown's Reports in Chancery, 96.

to penalties, and which must have been allowed, had his lordship then been of opinion that the transaction was illegal.

I have cautiously abstained from entering into the question, how far bonds of this description are or are not consistent with public policy; and I have done so, because however proper, if the case were new and doubtful, it might be to take this question into consideration, yet if the case is not new, but such bonds have been held good for centuries, as it appears to me they have been, it is now too late to consider that question in a court of law, and if it is considered right to put a stop to them on the ground of public policy, the legislature are the proper persons to do so. Were the case new, I am not prepared to say it might not be proper to prevent the giving of these bonds; but if so, it seems to me that it would be the proper course to put an end to them altogether, and not to make a distinction in favour of those which it has been said are good because they only enforce the performance of those duties which are required by law to be performed. If the law requires the performance of a duty, why not trust the enforcing such performance to those authorities to which the law of the country has entrusted it, and who have the power of determining how far any regulations for the rigid performance may or may not be relaxed or dispensed with? Why is it necessary to call in the assistance of the patron, and give him the power of enforcing it by a more severe punishment than the law would inflict, and the inflicting of which would confer an advantage on the patron, which the ordinary process of the law would not give him.

With respect to one of the cases in which a bond

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of resignation has been allowed, namely, that of non-residence, I am not sure that the case stated upon that subject, does proceed from so pure a motive as has been attributed to it. Take for instance, the case of *Whiston v. Partridge*, before cited. The condition is, that the party shall reside, without absence of eighty days in any one year. When it is considered that at the period when this bond was entered into, absence of eighty days in the course of any one year put an end to any lease which might have been made of the tithes, or any part of the benefice, one is compelled to conjecture that there was some other reason for the insertion of that provision, than the good of the church, or the punctual performance by the incumbent of the duties of his situation.

I forbear, however, to say more upon this topic, because, as it appears to me, the practice of giving these bonds has too long prevailed, and has been too often recognized as legal, to permit it to be altered by any other than legislative authority. For these reasons, and upon the most attentive and full consideration I have been able to give to the authorities, I feel myself bound to state my humble opinion:—That sufficient matter does not appear upon the record to show that either by the statute or common law, the bond upon which the action of the Defendant in error was brought in the court below stated upon the record to bear equal date with the writing of presentation therein mentioned, is void and illegal.

Mr. Baron Hullock.—After much reflection and research upon the subject, I have arrived at a different conclusion from that which is the result of the deliberation of my learned brother. But I con-

cur in the opinion which has been stated, and which I have reason to believe is the opinion also of all the learned Judges now present; that this record discloses sufficient matter to show, that the bond in question was given in consideration of, and as the price of the presentation of the Plaintiff in error to the rectory of Kettering. For a considerable time I felt much difficulty on this part of the case; because, although no plain unlettered man can peruse the condition of this bond without, as it seems to me, at once perceiving that such was the fact; yet still it appeared to me to be doubtful whether that conclusion was more than an inference which, however well warranted in ordinary cases of construction, was yet insufficient, in the absence of distinct and positive averment, to warrant a court of law in acting upon it, in a case where the question is, whether the parties to the contract have acted in contravention or violation of the enactment of a penal statute. In all cases in which the charge involves in it a breach of violation of a penal statute, it is essentially necessary that the act charged should be brought by express and positive allegations within the language and letter of the statute. I apprehend that if the Defendant below had, in this case, been advised to have pleaded specially, instead of suffering judgment to go against him by default, his plea would have shown by precise and positive allegations, that this bond was given in consideration of and for and as the price of the presentation, and that the presentation was made or conferred in consideration of and in return for the bond. A plea so framed would, if established in point of fact, have brought the case directly and unequivocally within the language of

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the statute.* Further reflection, however, and opportunities of conversing upon the subject, have satisfied me, that it is clear, from the language of the condition itself, that this bond was given in consideration of and for the presentation, and that the presentation was made in consideration of the bond: in short, that this instrument was the result of barter and contract between the obligor and the obligee, for and in respect of this living.

The condition of the bond commences with a recital, that the obligee is the patron of the rectory of Kettering, which rectory was then vacant by the death of the late incumbent thereof.—That the obligee, by writing under his hand and seal, bearing equal date with the bond, had presented the obligor to supply the said vacancy, and to be rector, in order that he might be instituted and inducted thereto; and that the obligee had agreed to resign the said rectory, upon such request or notice as thereafter mentioned, so as that the said rectory might thereby again become vacant, for the sole purpose, that the owner of the advowson of the said rectory might be enabled to present thereto one of two brothers of the obligee, therein specifically named, when the party to be presented should be capable of taking an ecclesiastical benefice.

Now can any person, after reading these passages, from the condition of the bond, have a doubt of the nature and character of this contract? Assuming, then, that it is sufficiently evident, by the matter appearing on this record, that the bond in question constituted the consideration for this presentation, is it an instrument avoided by the statute?† By the

* 31 Eliz. cap. 6, sec. 1. 5.

† 31 Eliz.

fth section of that statute, "If any person shall or do, for any sum of money, reward, gift, profit, or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance of or for any sum of money, reward, gift, profit, or benefit, whatsoever, directly or indirectly, present or collate any person to any benefice, with cure of souls; or give, or bestow, the same for or in respect of any such corrupt cause or consideration; that then every such presentation, and every admission, institution and induction thereupon, shall be utterly void and of no effect in law." And the Act then proceeds to subject the parties to certain forfeitures and incapacities.

By the word "corrupt," as used here, and as applied to this subject, it is quite clear, that every presentation, which is not gratuitous, is corrupt. By the former part of the clause, presentations, for money, &c., "are prohibited"; and by the latter part of this section, presentations, made for such corrupt cause, are avoided; clearly considering such cause, that is, a bond, &c., made for the presentation, to be a corrupt cause. And the statute was intended, (as appears by the preamble to the fifth section, which is printed incorrectly, at the end of the fourth,) for the avoiding of simony and corruption in presentations to benefices, &c.

It may be observed, that the statute does not in express words avoid the bond itself, but merely the presentation made in consequence of or under it. But still, upon general principles of law, I conceive it to be quite clear, that the bond made for the purpose of furthering an object prohibited by a statute is void, and can never be made the foundation of an action: and this doctrine is laid down in the clearest

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manner, by Lord Holt, in *Bartlett v. Viner*.^{*} In that case, that learned judge expresses himself thus: "Every contract, made for or about any matter or thing, which is prohibited and made unlawful by any statute, is a void contract; though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are no prohibitory words in the statute: as, for instance, in the case of simony, the statute only inflicts a penalty by way of forfeiture, but doth not mention any avoiding of the simoniacal contract; yet it hath always been held, that such contracts, being against law, are void."

The inquiry then, will be, whether a bond of this description be a benefit, either directly or indirectly, to the patron; because, if it be, it will fall immediately within the words and operation of the statute; and any presentation made for such a bond will be void.

It is denied that this security is either a profit or a benefit in the true spirit and intendment of this clause of the statute.

If the judgment of the Court below is sustained, the obligee would be entitled to take out execution upon his judgment for the sum of 12,000*l.*, with his costs of suit. A right to enforce the payment of such a sum of money looks like a profit, like a benefit, it appears difficult to raise a serious doubt upon the question. The opportunity afforded by this species of bond of providing for a son, or a brother, or relation, must surely be considered a benefit to a patron. If it be a benefit, how has it been acquired? why by means of a corrupt bargain for the presentation.

But consider this contract in another point of view. It is not compulsory on the obligor to resign,

^{*} Carth. 252.

he has an option either to do so or to pay the penalty, and, as has been well observed by Eyre, B.* in the *Bishop of London v. Ffytche*, "Is the chance that the obligor (who may) will so elect worth nothing to the obligee? The obligor may resign or pay the money, and the obligee cannot, at all events, compel him to resign. If that be so, what would be easier than the making of this species of contract the means of selling an advowson during an actual vacancy? The value of the living is calculated—a bond is given for the amount, conditioned to be void if the incumbent resigns on request, when a certain specified individual has become capable of taking the living. That event happens almost immediately by the nomination of a person who, if he lived, would, within a very few months, become capable of holding an ecclesiastical benefice. The incumbent is called on to resign: he refuses, but prevents a suit on the bond by paying to the obligee the amount of the penalty. Would not such a proceeding, if this bond be legal, operate a benefit to the patron for and in respect of his presentation; but whether the money or the resignation of the living is obtained, the obligee acquires to himself a benefit in every sense of that word for his presentation.

It has been however argued, as it was said in the *Bishop of London v. Ffytche*, that the word "benefit" in the 6th section of the 31 *Elix. c. 6.* cannot be construed according to its ordinary meaning, inasmuch as such a construction would have the effect of rendering the 8th section of the statute nugatory. The true answer to that sort of reasoning is given by Mr. Baron Eyre in the case of the *Bishop of London v. Ffytche*. It appears to me that the word "benefit"

* Cunningham, 52.

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in the 8th section of the act must receive the same meaning as it possesses in the 6th clause of the act. The word "benefit" in the 8th section means something *ultra*, something in addition to the value of the thing exchanged. In exchanges neither living can be considered as better or worse in legal intendment, because they are, in the estimation of those that make them, perfectly equal, however other persons may differ upon the subject. Mr. Baron Byre puts the case thus: "A living in the air of Berkshire may be reckoned an equivalent for the difference in value of an incumbency in the Hundreds of Essex." That is a fair argument. Each man throws into the scale circumstances which establish a perfect equilibrium in cases of exchange between parties. In a case where there is not a single shilling passing, if there is any other extrinsic benefit whatsoever to the smallest amount, it is made a part in the consideration of such exchange, and there is no question that upon this Act of Parliament such exchange will be void. Since the decision in the *Bishop of London v. Ffytche*, we are bound to say that a general bond of resignation is bad in point of law. That decision must have proceeded either on the ground that such a bond was a benefit to the patron, and therefore prohibited by the statute, or that such a bond was void on grounds of public policy. It was contrary to the policy of the law to permit the incumbent of a living to be placed under such a control as must necessarily result from such an instrument. In *Legh v. Lewis*,* Mr. Justice Le Blanc says, that the decision in the *Bishop of London v. Ffytche* against the validity of general bonds turned ultimately on the ground of their

* 1 East 398.

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being simoniacal and against the statute. If the decision alluded to proceeded on that ground, then I would humbly ask, on what principle or ground of reason can the effect of the bond now in judgment be distinguished from the effect of a general resignation bond? The benefit or value of the two bonds may differ in amount or degree: a special bond may not be so beneficial or so valuable as a general resignation bond, but that is a mere difference in the degree, not a difference in the nature, or essence, or character of the instrument. I am unable to comprehend any other way in which a difference can be predicated between these two descriptions of bonds. No ingenuity, no subtlety that can be employed on the subject, can succeed in establishing any other distinction between general and special bonds of resignation; and if the facts disclosed upon this record are adverted to, the absolute identity of these bonds in principle and operation will be most palpable. One of the nominees in the bond is now competent to hold an ecclesiastical benefice. But the patron cannot be compelled by any mode or way which any lawyer can point out, to make the request or give the notice mentioned in the bond. That being the case at the commencement of the suit below, the obligor stood precisely in the same situation as an obligor in a general bond would be in the moment after he had executed that description of bond.

If, then, general bonds of resignation were decided to be bad, as being contrary to the statute of Elizabeth on the ground of their operating as a benefit to the patron; it seems to me more than difficult to contend with success, that a special bond, operating in the same way, can be supported as an efficient instrument. If both species of bonds operate as

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benefits to the patron, though not to the same extent in point of value, they still must operate equally in violation and contravention, of the provisions of the statute.

But it has been argued, that, admitting the case of the *Bishop of London v. Ffytche* to be law, yet, inasmuch as it was decided, as it has been strenuously alleged in direct contravention of a long train of decisions in the Court below; that case ought not be carried beyond the strict letter of the decision, and that, therefore, your Lordships will restrict its operation to general bonds of resignation merely.

In confirmation of this view of the subject, it is said these special bonds of resignation have been holden valid and unimpeachable at several times, and by several judges, and in several decisions in the Courts below, since, and notwithstanding the determination in the *Bishop of London v. Ffytche*. It cannot be dissembled, that, since the decision so often referred to, resignation bonds with special conditions have been treated on several occasions as legal instruments in the Courts below. It may be, therefore, material to advert to the modern cases in which this question has been agitated, and it will be found, and it is a most singular fact, that in no case since the determination in the *Bishop of London v. Ffytche*, has the construction of the statute of Elizabeth ever been the question before the Court.

The first case of which I am aware in which the *Bishop of London v. Ffytche* is mentioned is, *Bagshaw v. Batley*, Clerk; * that was a bond given by the incumbent to the patron on presentation to

* 4 T. R. 78.

reside on the living, or to resign it if he did not return to it after notice, and also not to commit waste, &c. in the parsonage-house, and it was held good. In giving judgment, Lord Kenyon said, "This bond was only entered into for the purpose of securing a performance of all those duties, which by law, and without the bond, he was bound to discharge." He then proceeded thus: "I avoid saying any thing about the case of the *Bishop of London v. Ffytche*; when that question comes again before the House of Lords, they will, I have no doubt, review the former decision, if it should become necessary. It is sufficient for me to say, that this case cannot be governed by that." Mr. Justice Buller said, "I cannot find any immorality or illegality in this bond. It is the duty of the incumbent to reside on this living, and to be regular in the discharge of his duty. Now this bond requires nothing more. It only requires him to do what the law would have compelled him to do without it."

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The next case is *Partridge v. Whiston*, Clerk;* that was an action of debt upon a bond, conditioned; —to reside; to resign for the patron's son to be presented; and to keep the premises on the living in repair. In that case the Defendant pleaded two pleas to the bond; and the question now before your Lordships might, as it would seem, have been raised on the first special plea, which set out the condition upon oyer; and this in effect averred, that the presentation was given in consideration of the Defendant's entering into the bond to resign the living upon the Plaintiff's son taking priest's orders. To this plea there was a demurrer and

* 4 T. R. 359.

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joinder. But the Court, understanding that it was intended to carry the case up to this House, gave judgment for Plaintiff without argument. They said, as this was not precisely similar to the *Bishop of London v. Ffytche*, they were bound, by the established series of precedents, to give judgment for the Plaintiff. In this case, therefore, the construction of the statute of Elizabeth is never once thought of.

The next case to which I call the attention of your Lordships, though not in order of time, is that of *Newman v. Newman*.* That was debt on bond, conditioned ;—to pay money to the obligee upon the conveyance of an estate to the obligor, and to present the obligee's son to the next avoidance of a church, the advowson of which belonged to the estate, if he were then of age to take it, or if not to procure the person who should be presented to resign, upon notice of the son's being qualified to take it, and to present him. These facts appeared on oyer of the bond, and were alleged to be simoniacal ; there were a demurrer and joinder ; and the Court decided that, as the bond was conditioned for the performance of several things, some of which were good, the bond was valid, although one of them might be void at the common law ; after argument Lord Ellenborough said, " What the effect of a bond of resignation in favour of a son might be, was not, I believe, touched upon in the *Bishop of London v. Ffytche*, though, perhaps, it might be argued that there is no reason for any distinction, because a parent would be more open to prejudice and improper bias in favour of a son than of any other person." Mr. Justice Le Blanc said, " The

* 4 Maule v. Selwyn, 66.

reason for making an exception in favour of a condition for presenting a son might be, because it was not for a money consideration."

Mr. Justice Dampier said, "A stipulation to resign in favour of a specified person, does not seem to be open to the same objection as if it were to resign generally, because the latter makes the incumbent a mere tenant at will to the patron. I know that since the case of the *Bishop of London v. Ffytche*, it has been considered that bonds of resignation in favour of certain specified persons are not illegal." In this case, the judgment is given on that part of the condition of the bond which was held good, and no judgment was given on the part of the record applicable to this question, and the opinion of Lord Ellenborough seems rather against the validity of special bonds of resignation as not distinguishable from general bonds. Mr. Justice Le Blanc's opinion proceeds entirely on the ground of a special bond of resignation not being for a money consideration, and therefore not bad. But the statute law is not confined to money considerations. Mr. Justice Dampier seems to consider special bonds good; but his reasoning is equally applicable to both descriptions of bonds; and if his reasoning be correct, this bond is bad, because clearly here the obligor is at this moment tenant at will, &c.

In *Legh v. Lewis*,* this species of bond was touched upon, though not the point in judgment. That was the case of a bond given by a schoolmaster, of an ancient public school, who had, as it was said, a freehold in his office, to resign at the request of his patron; the Court held the bond

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* 1 East, 391.

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good. The question arose upon a demurrer to a plea which after oyer stated all the facts on the record. In giving his judgment Lord Kenyon says, "I never can admit that at common law, a general resignation bond of an office is illegal, although a party may have a freehold in the office. In the instance of ecclesiastical livings that is universally the case; every rector has a freehold in his rectory, yet it was never doubted, but that resignation bonds, for certain purposes, and up to a certain extent, at least were binding, though they put an end to the freehold." Mr. Justice Lawrence expressed great doubts on this question. Mr. Justice Le Blanc agreed with Lord Kenyon, that the bond in that case was good; he thought it fell within the principle of the former determinations, that general bonds of resignation were good at law. I shall, however, have occasion to advert again to this decision.

I am not aware of any other case upon this subject. From this review of the modern cases, it is quite impossible to say that any question concerning the validity of special bonds of resignation has ever come neatly before any of the Courts below, with the exception of *Partridge v. Whiston*, in which a formal judgment was given in support of such a bond without argument, for the purpose of a writ of error. What became of that case I do not know.

It has been seen then that no well grounded argument in support of a special bond of resignation can be drawn from modern cases: and it will be found, I believe, that the more ancient ones are equally destitute of general reasoning on the subject. If any one will take the trouble of toiling through the old cases in this matter, he will not, -

believe, find any decision in which the validity of either species of bond has been discussed or argued on general reasoning, either on the statute or common law.

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For these reasons, therefore, it appears to me that I ought to answer the question proposed to the judges in the affirmative; that sufficient matter appears upon the record to show that by the statute law the bond in question is void and illegal. But assuming that the decision in the *Bishop of London v. Ffytche* proceeded on the ground that the bond in that case was void, as being contrary to public policy, although it might not be a benefit within, or contrary to, the provisions of the statute of Elizabeth, I am disposed to maintain, that the bond in this case operates equally against public policy, and is therefore on that ground equally void and illegal.

Bonds of this description have no existence at the common law, because it was not until a period long subsequent to legal memory that the right of patronage, in the manner in which it now generally obtains, had its origin; but still these bonds, if they operate to the prejudice or detriment of the public interests, are contrary to the common law, inasmuch as every bond or contract which operates against the public convenience, or to the public prejudice, is, upon the principles of the common law, void and of no effect. This doctrine is familiar to every one, and is recognised and illustrated in the case of *Collins v. Blantern*.*

If no authorities could be found on the subject; if the question were *res integra*, few persons, I think, would contend that this species of instrument given in consideration of and for the presenta-

* 2 Wils. 348.

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tion to an ecclesiastical living, is capable of being supported on sound principles of law.

Before the *Bishop of London v. Ffytche*, numerous cases occur in the books upon the subject; but no one of them, as far as my researches enable me to speak, contains any reasoning or argument in support of these bonds. The authority of these cases seems to depend mainly upon tradition; certainly more upon positive authority than good reasoning. In the latter cases, the judges, whilst they seem to admit that if the question were new, the validity of these instruments could not be supported, decide upon authority merely, and refuse to hear any argument upon this subject.

In 12 *Mod.* 504. 13 *W. 3.* Mr. Justice Powell expressed an opinion against resignation bonds, if the authorities had not bound him. He says, that when first the judges held these bonds good, if they had foreseen the mischief of them, they would have been of a contrary opinion. The same opinion is expressed on this subject by Mr. Justice Buller, in the *Bishop of London v. Ffytche*, when that case came before the Court below;* and afterwards, when that case was before your Lordships, the same learned judge says, that he had taken no small pains to find out upon what principle all the cases had gone, but without much effect; for after all the labour he had bestowed upon the subject, it seemed to him they were destitute of all sense, reason, and principle. And in *Legh v. Lewis*,† Mr. Justice Lawrence says, speaking of general resignation bonds, it must be admitted, that if it were a new question at this day, it would be very difficult to say upon principle, that such bonds could be legal, and

* See 1 East, 487 n. (a).

† 1 East, 396.

an opinion in accordance with those to which I have just adverted, has been oftener than once expressed by the highest living authority. On several occasions the noble and learned Lord to whom I allude, has expressed himself unfavourable to those bonds upon principle. He has declared, that the only perplexity he has experienced on the question has arisen from the authorities. No one who has taken the trouble of wading through the cases which are to be found in the books upon the subject of bonds of resignation will, I think, be disposed to question the accuracy of the conclusion at which Mr. Justice Buller states himself to have arrived from a perusal of those cases. That learned judge declared, that the cases appeared to him to be destitute of all reason, sense, and principle. Your Lordships are, however, vehemently called upon to found your decision upon the present occasion on the authority of such cases.

With respect, however, to general bonds of resignation, the more ancient cases no longer exist as authorities upon the subject, and upon what view of the subject can either the ancient or modern cases be considered as authorities in support of special bonds of resignation? I would ask, upon what principle can a special bond of resignation be sustained, I mean with reference to public policy?

It may be worth while to advert for a moment to the nature and extent of the estate and interest which a rector has in point of law in his rectory after institution and induction. Few lawyers will be disposed to deny that by institution and induction a rector becomes seised of a freehold estate for his life in the parsonage house, the glebe, and the tithes of his rectory. The authorities are numerous

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and uniform on the point,* and distinctly stated by Lord Kenyon, in *Legh v. Lewis*, and by Lord Thurlow, in the *Bishop of London v. Ffytche*. In pleading, which is the best evidence of the law, a rector states that he is rector, &c. and as such rector that he was, and thence hitherto hath been and still is, seised in his demesne as of freehold, in right of his said rectory of, and in the tenements, &c. and being so seised, &c. If a rector, by virtue of institution and induction, acquires an estate for life, from whom does he derive it? Not from the patron, but from the ordinary. The patron has purely the right of nomination or presentment. That is the whole of the *jus patronatus*. The office is not in any sense conferred by the patron; it proceeds entirely from the act of the bishop. Then, upon what principle can it be justified at common law, that the patron shall be permitted to exact a security in derogation of this freehold estate, the effect of which will be the converting a life estate into an estate at will.

In the *Bishop of London v. Ffytche*, Lord Thurlow asks whether a bond of resignation, given by a judge or a master in Chancery, would be good. He says a master in Chancery is an officer appointed for life. Suppose the Chancellor has the appointment, and suppose such master gives a bond to resign when called upon, would that bond be good at common law? No, because it is not only contrary to the constitution of his office, but because the public have an interest in the independence of that officer, as being appointed for life, and a public law officer. His place is independent, it

* Wils. 347. Gibs. 661. Cro. Jac. 367. Noy, 104.

being *quam diu se bene gesserit*. If he is an officer for life, how can any private man whatsoever, because it is his province to appoint him, take upon him to render that officer's situation what the law says it shall not be? He apprehended it would be extremely difficult to justify those bonds. This reasoning is applicable *à fortiori* to bonds like those now under consideration; and the difficulty of supporting a bond of resignation, which, in effect, reduced a freehold office to a mere estate at will, is adverted to by Mr. Justice Lawrence, in *Legh v. Lewis*.* I have already had occasion to observe, that that was the case of a bond of resignation by a schoolmaster. There Mr. Justice Lawrence, after observing that it did not precisely appear on the pleadings, whether the office was a freehold office, says, that he had considerable doubts on the question, how far the person, who has the power of such appointment, could exercise it in a different manner from what the founder intended.

It may be added, that when the case of *Legh v. Lewis*† came on for argument afterwards, on a writ of Error in the Exchequer Chamber, the Court were clearly of opinion, that it did not sufficiently appear on the record, that the office of schoolmaster was such an office as ought for the sake of the public to be deemed a freehold office; and that therefore it was impossible to raise the important question which it was the intention of the parties to litigate, upon which question they declined giving any opinion. Hence it may be collected, that in a clear case of a freehold, (like the present case,) the invalidity of such a bond was considered, by the Court, a question of great difficulty and importance: and the

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* 1 East, 396.

† 3 Bos. and Pul. 231.

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difficulty of establishing a bond to resign a freehold office, at the instance of the person making the appointment, is suggested in *Layng v. Paine*. * That case, it is true, arose on the statute of 5th and 6th *Edw.* 6. c. 15, against the sale of offices; but still the language of the Lord Chief Justice is extremely applicable to this subject. He says, "I think this is a void condition (a condition to resign the office of Registrar of the Archdeaconry of Wells); for the donor to oblige the officer to surrender whenever he requires it, is to reserve to himself an absolute power over his officer, which he ought not to do: besides, if this were allowed, there would be a plain method chalked out to evade the statute; for any one, by this means, might sell an office for its full value; and such indisputably would be the consequence of supporting the present bond."

In *Newman v. Newman*,† in speaking of a special bond of resignation, Mr. Justice Dampier observes, that such a bond does not seem to be open to the same objection as if it were to resign generally, because the latter makes the incumbent but a mere tenant at will to the patron. Now if that reasoning be sound, it applies directly to the facts disclosed on the record. It is averred, that one of the nominees in the bond has become capable of taking an ecclesiastical benefice, of consequence the time has arrived at which the obligee may call for a resignation, according to the condition of the bond; but the obligee is not, therefore, obliged to take that step; he may do so, or he may let it alone. If that be so at the time of the commencement of the action in the court below, the obligor was a mere tenant at will to the patron. If he be allowed to retain

* Willes, 571.

† 4 Maule and Selw. 71.

the living, he would do so by the permission of the patron, and he would hold it on the tenure of the patron's mere will and pleasure. Can any one, then, seriously contend that the condition of this bond, which places the incumbent in such complete thralldom, under so absolute a dominion and restraint, can be supported upon any known or recognized principle of law? The inevitable consequences of such a state of things are too palpable and gross to be dwelt upon for a moment. Such a bond must necessarily operate to the prejudice, if not the total subversion, of the true and essential interests of religion.

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Suppose the clerk should resign in conformity to the condition of a bond of this sort, what obligation is there upon the obligee to present the individual specified in the condition? None. He may give the living to a stranger; and if the patron should present a stranger to the living, would the obligor have any remedy, either at law or in equity, against the obligee, for the non-presentation of the nominee in the bond? I should be curious to learn the precise species of remedy or redress, to which an obligor would, under such circumstances, be entitled. Again, there is no obligation upon the nominee to accept the living if it should be offered to him.

How can a clerk, after entering into a bond of this description, honestly take the oath which is administered to him previous to institution? * How can he sign his resignation in the form usually adopted, † if the ordinary permit him to resign, (which by the way he is not bound to do)? The words of resignation, according to *Gibson*, ‡ are

* *Gibson*. 802. 810.

† *Ib.* 1518.

‡ *Ib.* 851. 1518.

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ex certâ scientiâ purè spontè simpliciter et absolute resigno."

If the acceptance of the ordinary be necessary to give effect to the resignation, the undertaking of a clerk to resign a benefice is an undertaking which he has no power of himself to perform, because it depends on the ordinary, whether he will accept the resignation or not.

Another objection arises, on the ground of general policy, to this species of instrument; the patron becomes thereby precluded from choosing the most proper individual for supplying the living. If he act in the presentation according to the condition of the bond, his choice is fixed long before the fitness of the object can be ascertained. At the execution of the bond the nominee may be at college, or perhaps at school, or perhaps in his cradle.

Numberless other objections might be pointed out to this species of bond; but having already occupied too much time, I will conclude by stating it to be my opinion that this bond is void and illegal.

The old cases, as to general bonds of resignation, were overturned by the final decision in the case of the *Bishop of London v. Ffytche*; and as there is not, as far as I am able to comprehend the subject, any rational distinction between the two descriptions of bonds in their operation and consequences, I conceive that special bonds of resignation are equally destitute of principle and authority. I therefore am bound to say that, in my judgment, sufficient matter appears upon the record to show that, by the common law, this bond is void and illegal.

Garrow, B.—I not only entirely concur in the conclusion to which my learned Brother who has last addressed your Lordships has arrived, but also

in all the reasons which he has submitted to your Lordships for the opinion which he has formed. The case of the *Bishop of London v. Ffytche* has settled that general resignation bonds are illegal and void; and it appears to me that bonds of the nature of that which is stated upon this record, differ only from general bonds of resignation in degree. It appears to me to be essential to the best interests of the community, to its religion and morals, and to the character of that useful and honourable class of men, the parochial clergy, that from the moment of induction to their livings, they should be during their incumbency, perfectly free and independent. To place them, in any respect or degree, under the control of any person whatsoever, except their ecclesiastical head, to whom they are accountable for their conduct, would be very much to diminish their usefulness, and to introduce mischiefs only in some degree less than would be occasioned by their absolute dependance upon their patron under general bonds of resignation. To me it appears that if there was any distinction as to the person from whose influence a rector of a parish ought more than any other to be free and independent, it would be that of a patron to whom he owed his presentation.

For these reasons, and for those which have been stated by my learned brother who preceded me, I feel myself bound to answer the question propounded by your Lordships to the Judges in the affirmative, and to state my opinion that sufficient appears upon the present record to render the bond therein stated illegal and void.

Burrough, J. delivered his opinion that the bond was valid.

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Park, J.—It is necessary to clear the way by considering one branch of the question first, namely, whether the matter complained of sufficiently appears upon the record to show that the bond was given in consideration of the presentation. Upon this point I believe we are all agreed, however we may differ on others. If this statement of the condition of the bond on the face of the record show it to be illegal, it is not necessary to show it again by express averment, but it is sufficient without any allegation in pleading. I agree that you cannot avoid this bond under the statute, however it may be at the common law, unless it was given in consideration of the presentation. For the statute, I humbly conceive, does not in terms make the bond void, but it renders the presentation void. The bond is only avoided as a consequence of the other. It was therefore necessary to see whether the bond was a consideration for the presentation; and I think in reading these pleadings, it was impossible that the judges should be otherwise than unanimous.

In the first place, it is stated that on the very same day by writing under his hand and seal, bearing equal date with the above-written obligation, Lord Sondes had presented; so that manifestly, these were concurrent acts, probably both signing and sealing at the same table in the same instant of time. But it does not stop there, for the consideration of the bond states that the said Brice William Fletcher has agreed to resign; speaking, therefore, in the past time, and prior to the execution of the bond, which only bore equal date with the presentation, and therefore it cannot be doubted that the one was given in consideration of the other: indeed it seems

impossible, and common sense revolts at the supposition that such a bond should be given, which is not in consideration of a presentation; for would any man carrying his reason with him, who has actually gotten a living in his possession, give a bond to resign it? I therefore pass from any further observation on this point.

This brings me to the great question in the case, whether this bond is void or illegal by the statute or by common law. In considering this case, I presume I am to understand myself as bound by the case of the *Bishop of London v. Ffytche*, and to treat that case as the foundation of my argument; if so, I then have no difficulty in stating my humble opinion to your Lordships to be, that the judgment below in this case cannot be supported.

That was the case of a general resignation bond in favour of one of two individuals. Now I should be glad to ask, where in principle is the difference between the one and the other? They vary in degree, but not in kind. If a bond to resign in favour of one of two individuals be good, where is the line to be drawn? Why may it not be in favour of one of three, of one of four, of one of five, of one of six, or till it becomes as general as if no name at all were mentioned, but stood simply and generally, as in *Ffytche's* case, to resign upon request? If good in favour of two sons or two brothers, as here, there can be no limitation whether the nominees are to be sons, brothers, cousins, friends, or mere acquaintances. In short, unless I greatly deceive myself,—and I have taken great pains to understand the case,—if evils of great magnitude were likely to flow from general bonds of resignation, I think it requires no great degree of penetration to discover

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that all the mischiefs which were apprehended in the one case, if well grounded, will unavoidably result from the other. But it is said, though the case of *Efytche* must now be taken to be law, yet that proceeded against the strong opinions of Westminster-hall, and that decision overturned a great many former decisions, and ought not to be carried further but by legislative enactments. I agree in much of this; I am old enough in Westminster-hall to remember that the decision of that case created a great sensation in the profession. Probably, upon a cool and dispassionate consideration of that case, it may not stand so devoid of authority, of sound principles of policy, for the interests of the church and of religion, as was supposed at that time; nor must it be taken for granted that the policy of allowing general bonds of resignation had never been doubted by very great judges in our courts of common law. For, besides some of those authorities which are to be found in Mr. Cunningham's collection of cases in simony, and in many of which the case had not been argued, and had not been decided upon, I have lately found that Lord Chief Justice Willes certainly thought them bad; and he was no mean authority, for in Mr. Durnford's valuable edition of that learned Chief Justice's Reports, pages 574 and 575, where he is giving judgment on the validity of a bond given by the Register of an Archdeacon, to surrender whenever the person appointing chose, his Lordship says: "This case was compared to the case of simoniacal bonds; and to be sure the comparison is a very just one, for it has been holden that a bond given by a parson to his patron to resign generally is bad." His Lordship, it is true, excepts this case,

“ and not to a particular person ;” but I have only troubled your Lordships with this quotation, to show that the doctrine established in *Ffytche's* case was not so new as was supposed ; and the case of a resignation to a particular individual was the only one excepted by Lord Chief Justice Willes. However this may be, I am not called on to re-argue *Ffytche's* case ; it is established law ; and I do not agree with the conclusion sought to be drawn from it by the bar, that that case is gone to its utmost verge, and ought not to be carried further but by statute. If the House were now called on to establish a new and uncertain principle, which had never been known or acted upon before ; in that case legislation alone ought to administer the remedy required for the existing evil. But where, as I have presumed to say before, the principle is precisely the same, that all the mischiefs flowing from the one inevitably flow from the other ; where they vary in degree, but not in kind, I think the case no more requires legislative interference than one half of the cases every day occurring in Westminster-hall, where the old principle is applied to new combinations of circumstances, in order to circumvent the inclinations of those who ingeniously are endeavouring, by slight alteration, to defeat or evade the decisions of the Courts.

Is this, then, a case within the statute of Elizabeth ? The bond is admitted to be the condition of the presentation : the words of the statute are, “ that if any person or persons, for any sum of money, reward, gift, profit or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant or assurance, present or collate, &c. such presentation shall be utterly

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void, frustrate, and of none effect in law : " And consequently a bond, the condition of which is illegal, cannot be enforced. But it is said this is not a profit or benefit within the statute. If it be not, I cannot well tell what is or ever will be. This very case shows, if Lord Sondes succeed, he will have an actual pecuniary profit or benefit by the presentation, and may be considered as having sold it for 12,000*l.* I am much at a loss to apprehend any case of a bond of resignation, general or special, which is not a profit or benefit even in the case most highly to be favoured by a Court, and perhaps the least guilty of all, a bond to resign in favour of a son ; is not that a benefit ? Suppose the son twenty-one, and the father allows him 400*l. per annum* till he is of the canonical age of twenty-four, and that the living he intends for him falls vacant, and he fills it up for three years, taking a bond in 12,000*l.* then to resign in favour of his son. If the incumbent resign, the patron puts his son into a living, perhaps, of eight hundred a year, derives the benefit from saving his own allowance of 400*l.* ; or if the incumbent will not resign, finding the living cheaply purchased for 12,000*l.* and pays the penalty, the patron gets all that money to settle on the son, and thus in effect he sold a void presentation. Depend upon it, my Lords, that if these special bonds, as they are called, be allowed, you will have every device put on foot by artful, designing and acute men in the lower departments of the law, to evade and elude the wholesome provision of this statute, and render it a dead letter on the statute book. Indeed I verily believe that special bonds of resignation, though known, never came into very general use till after,

and was a contrivance to elude, the decision in *Ffytche's* case. It is too much to be feared that, if encouraged, these special bonds will be given as if intended for cases of resignation; but will be a mere device between a needy patron and a monied incumbent to pay a sum of money in two or three years as the apparent penalty for not resigning, when it never was intended he should, but only in this form he should secure a future, when the law clearly would not permit a present payment. In short, to my understanding, to say that where a bond is given under a large pecuniary penalty, by which the clerk is engaged to resign the benefice to the patron on a given event, is not a benefit to the patron, as well as where the resignation is to be on request, is a proposition revolting to common sense and to the apprehension of mankind. It must be a benefit; why then is it not a benefit within the statute? for there are no words of limitation on the generality of the term.

Your Lordships will observe, I have not troubled you with the long string of cases to be found in Cunningham's Law of Simony, which have been all brought forward and commented upon by the learned counsel at your Lordship's bar. And I have purposely abstained from doing so, because I considered myself as standing upon the last decision in *Ffytche v. The Bishop of London*, which had closed all discussion upon general resignation bonds. I have thought it my duty to state to your Lordships my humble opinion and the reasons for that opinion, that most of the evils and inconveniences arising from general resignation bonds apply in kind, though perhaps not in species, to the description of bonds mentioned in this case, and being clearly of

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opinion that this case falls within the statute of Elizabeth. I ought, perhaps, here to relieve your Lordships from further hearing me, and I shall not trouble the House much longer; but I own it does seem to me that such bonds are against the general policy of the law of England. It is amongst the first things we learn in the law,* that a parson has, during his life, the freehold in himself, and of which he can only be deprived in five ways: by death; by cession in accepting another incompatible benefice; by consecration to a bishopric, unless by the favour of the Crown he is allowed to hold his benefice *in commendam*; by resignation, if the ordinary will accept; and by deprivation for crime.† The Bishop cannot institute him for a less term, and yet the effect of resignation bonds, general or special, is to convert that office which by presentation, institution and induction, becomes an office for life, and in which the rector has the freehold into a term for years, of longer or shorter duration, at the pleasure of the owner of the advowson, according to the object he has in view. Therefore, any "Contract, Bond," &c. by which the incumbent undertakes to resign, being inconsistent with his actual situation as recognised by the law, and with that life estate, which, as Rector, he has in the living, must be contrary to law.

When your Lordships come to consider the Oath of Simony, as it is called, which every rector must take when instituted to a benefice, as prescribed by the Canons of 1603,‡ is it fitting that a patron on one hand, should have power to entrap the

* 1st Blackstone's Commentaries, 385.

† Littleton, 528. Co. Litt. 120 a, 341 b, and 300 a and b.

‡ Canon 40.

conscience of a poor needy Clergyman, perhaps under the pressure of great poverty, or the cries of a starving family; or that such a miserable man be thus tempted to violate his duty to God, as his immediate servant, by taking God's holy name in vain, and to call upon him to witness a falsehood? can a man who deliberately swears "That he has made no simoniacal payment, contract, or promise, directly or indirectly, by himself or any other, to his knowledge, or with his consent, for, or concerning the procuring, or obtaining, of this ecclesiastical dignity, place, preferment, office, or living, &c., so help him God through Jesus Christ," be fit to serve in the sacred offices of the Church of that God and Saviour whom he has dared thus solemnly to adjure and witness that he has not entered into any contract, when the ink is not dry, nor the wax cold, which have been used in the concoction of this unlawful instrument? Your Lordships will find from this observation, that I am in no respect advocating the conduct of the Plaintiff in error, either in the first instance, in giving such a bond, or in the last, in refusing to obey the conditions of it. His poverty may have seduced him into the first offence, but his conduct in the last must call down the reprobation of every honest man who has the cause of pure religion and sound morals at heart. The noble Defendant in error may not have known the nature of the oath which his presentee was to take, and I wish and hope that may be his excuse. But these bonds are, in my judgment, my Lords, fraught with still greater evils with respect to society: the moment a man is instituted and inducted to a Rectory, the law assumes, considers, and wishes him to be independent, and free from all control, except that of his ordi-

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nary, in the exercise of his high and spiritual authority; but these bonds must necessarily often have the effect of placing him under the control of the patron, in situations very improper and extremely unbecoming the clerical character. I wish not to enlarge on these points, because I think too highly of the clergy to suppose that many would yield to any very unreasonable requests; but my objections apply to the temptation of doing so being often great, where urgent calls may aid that temptation.

But it is said that Bishops may be trusted not to accept of resignations under improper circumstances. I am willing to admit this: but will persons who make no scruple of entering into such engagements, and who scruple not to call the God of Heaven to witness a falsehood, make any difficulty of keeping back from the Bishop every fact which would endanger his institution or his mandate for induction? And can a Bishop, without some information on which he can act, deal so uncharitably with his brethren, as to think it necessary to put such sifting questions to every Clergyman who comes to him for institution, as imply a belief, or even a suspicion, that he has sworn, or is coming to take a false oath? Or could he, without the same breach of Christian charity, suspect that every Clergyman who resigns a living into his hands, declaring thus, *ex certâ scientiâ purè spontè simpliciter et absolutè resigno*, has, notwithstanding, entered into a simoniacal bond to do so, when, at the same time, it is undoubtedly true, that he who would take such an Oath of Simony contrary to the truth, would feel no difficulty in asserting that his resignation was *purè et simpliciter*?

The case of *Bossley v. Bagshaw** has been

* 4 Term Reports, 78.

pressed upon your Lordships, which was the case of a bond to reside on the living, or to resign. The court upheld that bond, because it supported the cause of religion, by insisting on what is so essential to the good of the cause, namely, the residence of the incumbent. My Lords, I am not called upon to say, whether such a bond thus abstracting from the authority and giving to the obligee of the bond the power of the Bishop would, in my opinion, be good; but it is different from this case: I believe it was quoted for the opinion of Lord Kenyon on *Ffytche's* case, but I consider that case not now open to discussion; and, after all, what is the *dictum* of Lord Kenyon in that case? (He was Counsel in that cause, and his mind might naturally be disposed to have considered it in a particular way.) But his Lordship only says, "when that question comes again before the House of Lords, they will, I have no doubt, review the former decision, if it should become necessary." This does not infer that there will be any difficulty in the case if it come before you.

There is another case of *Partridge v. Whiston*,* which was a special bond of resignation in favour of a son; but the Court heard no argument, and gave no opinion, except that it was not the same as that of *Ffytche*, and understanding that it was to go to the House of Lords, gave judgment for the Plaintiff. With respect to those Cases in Equity, in the time of Lord Chancellor Eldon, in which his Lordship has been supposed to hold the validity of special bonds of resignation, I take it his Lordship meant no more than this, that there being a general notion that such bonds were good, he would

* 4 Term Reports, 559.

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not, as a single Judge, take upon him to decide upon their validity or invalidity, but he would put the question in such a shape as to obtain the judgment of this House upon it, and accordingly, his Lordship sent one of the cases to the Court of King's Bench, but I believe it was compromised. This I assume to be the extent of Lord Chancellor Eldon's intention in the Court of Chancery; and he, who is now present, best knows whether I have drawn the right conclusion from what he expressed. I understand the Lord Chancellor assents to my statement, and a case now has arrived for the opinion of this House.

I beg pardon for having trespassed so long on the attention of the House, but I conclude with stating my clear opinion, that sufficient matter appears upon this record to show, that by the statute law (and, for the reasons above given, I am strongly inclined to think, that by the common law also) the bond on which the action of debt was brought, and which bears equal date with the writing of presentation, is illegal and void.

*Burrough, J.**—I agree with Mr. Justice Gaselee, in thinking that the bond is valid. The case of the *Bishop of London v. Ffytche* turned upon the actual admission in the pleadings of the simoniacal contract. Being so admitted, the decision in that case could not possibly have been otherwise.

Mr. Baron Graham.—My Lords, this is a bond for the performance of an agreement, and a breach assigned, under the 8th and 9th of *William and Mary*, cap. 11, sec. 8, which says, "that in all actions for non-performance of any covenants or agreements, in any indenture, deed, or writing con-

* This opinion should have preceded that of Mr. J. Park. It is misplaced by accident.

tained, the Plaintiff shall assign as many breaches as he shall think fit, and the jury shall assess," &c. The Defendant in error has proceeded under this Act. Here the breach assigned is a breach of the condition of the bond; the condition therefore is the expression of the agreement of the parties. Your Lordships, therefore, must look to the form of the agreement as expressed in the condition of the bond, and must put a construction upon it. Looking at the simple expression of the transaction, and the occasion of it, I think that it appears by the plain and natural construction, that the presentation was acquired solely upon the terms of giving this bond; that is, that the bond was the consideration or the price paid for the presentation; why else are both these instruments of the same date? probably executed on the same day, the presentation being first executed, in the order and course of the transaction, as before the parson presented gives a bond to resign, he must have something to resign. It seems to me impossible to consider the presentation as a separate act, independent and unconnected with the bond. Suppose that, after Lord Sondes had executed the presentation, Mr. Fletcher had refused to execute the bond, would not Lord Sondes have refused to give validity to the presentation, and he had a power to revoke it? * "If a man present his clerk to the Bishop, he may present another before the Bishop has received his clerk;" *à fortiori*, Lord Sondes might have cancelled his seal before he sent the clerk to the necessary service of presentation to the Bishop. The language is, "whereas Lord Sondes has presented,

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* 2 Rolls Abr. 349.

~~PER.~~ ~~AND~~ ~~WHEN~~ Fletcher has agreed to resign." What is ~~THE~~ ~~THE~~ ~~THE~~ to say, that Lord Sondes has presented, be-
~~cause~~ ~~Fletcher~~ has agreed : The inducement of Lord
 Sondes to present, is the agreement of Fletcher to
 resign : in other words, the consideration of the
 presentation was the agreement to resign ; for with-
 out it, by the terms of the agreement, the presenta-
 tion would not have been made, nor *vice versa*. If
 this be the clear sense of the agreement, the ques-
 tion is, whether this bond is within the 31st of *Eliz.*
 cap. 4 : that is, whether it is, directly or indirectly,
 a benefit within the true meaning of that statute.

Whether a benefit or not is best discovered by the
 use that is made of the bond : this view places the
 Defendant in error in a singular position. Argu-
 ments at your Lordships' bar were urged, to show
 that such a bond is not a benefit to the patron,
 within the true and approved meaning of that sta-
 tute : but the use which he has made of the bond,
 and the record which is now before your Lordships,
 prove, that it is a benefit to the extent of 10,000*l*.
 If it be said that this was not a benefit contemplated
 at the time, but was unexpected and remote, and
 the effect of the breach of good faith ; I answer
 it was the object of the bond to secure, when re-
 quired, a presentation, or to secure a compensation
 in case of such presentation being prevented. The
 bond secures a power to create a vacancy, or an
 equivalent for withholding that power ; the equiva-
 lent is therefore the exact measure of the value of
 that power, and that, in this instance, is ascertained
 to be 10,000*l*.

It is said, with a weight of authority which I re-
 spect, that these bonds, by contemporaneous deci-
 sions long followed, have never been considered as

benefits within the statute ; but that weight is much lessened by the discussions which took place in the *Bishop of London v. Ffytche*. That case has authorised us to look to this without the prejudices of past opinions, however high in estimation, or even past decisions ; and I may be allowed to say, that not one of those decisions underwent that full discussion as to the effect of those bonds, which it received in the case to which I allude, or received that illustration which has been thrown upon the subject by the arguments at the bar, and the state of the record in this case.

It is said that this is not corrupt : though there may be no moral turpitude in taking an equivalent for a thing given, yet it may be called a corrupt contract. In this case, a right of presentation is given, which the law forbids : it is a gift which the law does not allow, and is therefore corrupt. But, my Lords, I humbly think, that bonds of resignation, general, or in favour of a son or other person, are void, on the fundamental principles of the common law. A parson has a freehold at law. Lord Coke * says, “ In whom the fee simple of the glebe is, is a question in our books ; some hold that it is in the patron, but that cannot be, for two reasons, &c. ; some that the fee simple is in the patron and ordinary, but this cannot be, for the causes aforesaid, and therefore of necessity the fee simple is in abeyance, as Littleton saith. Upon consideration of all our books, I observed this diversity, that a parson or vicar, for the benefit of the church and of his successor, is, in some cases, esteemed in law, to have a fee simple qualified ; but to do any thing to the prejudice of his successor, in many cases, the

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* Co. Litt. 341.

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“ law adjudgeth him to have, in effect, but an estate
 “ for life. *Causæ ecclesiæ publicis causis æquiparan-*
 “ *tur, and summa ratio est quæ pro religione facit,*
 “ and *ecclesia fungitur vice minoris meliorem facere*
 “ *potest conditionem suam deterioorem nequaquam.*”

I will not say more on this head; your Lordships are aware of the able manner in which that was urged as the ground of the opinion of a noble Lord, in the case so frequently alluded to: I therefore humbly offer my opinion, that the question ought to be answered in the affirmative.

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The *Lord Chief Baron*.—The question is, Whether sufficient matter appears upon the record, to show that the bond on which the action is brought, is void or illegal, either by the common law or statute? I am one of those who are of opinion that enough appears upon the record to show that the bond is void and illegal. It is not my purpose to enter at great length into this argument; I should be in danger of occupying the important time of your Lordships, by a mere repetition of what has been already very clearly and strongly urged. I shall confine myself to a brief exposition of the course of reasoning which has led me to the conclusion I have stated.

I am of opinion that the condition of the bond, which condition is narrated upon this record, sufficiently shows the nature of this transaction; it shows that the transaction was a stipulation for the bond, on one side, and the presentation on the other. The bond would not have been given without the presentation, nor the presentation without the bond; the whole is one contract, of which these are the corresponding parts: this is, I think, manifest, upon the face of the instrument itself: the instrument is

upon the record, and we are therefore able to reach the merits of the question. Next I am of opinion, that the decision in this House, in the *Bishop of London v. Ffytche*, would, if I were otherwise disinclined to it, compel me to answer to your Lordships' question, that this bond is void and illegal by statute; this conclusion follows necessarily from that decision: it is, at it seems to me, a strict consequence of it. I cannot distinguish, upon any tangible principle, between a general and a special resignation bond. All objections, of all descriptions, which exist fatal to the one, affect the other; somewhat softened and alleviated, it is true, by the patron's supposed object; softened, not eradicated: they exist still, exactly of the same nature and character.

These are the general grounds of my opinion; I proceed to explain them somewhat more in detail, yet still I trust briefly. Upon the first point, that is, whether the contract, which taints this instrument, is sufficiently apparent upon the record, I feel it to be the less requisite to detain your Lordships, because the Judges appear to be nearly agreed upon it; I shall only say, that legal sense is very remote from the common sense of mankind, if the mutual contract is not manifest upon the face of the document. By the condition of the bond recited in the record, it appears that the presentation and the bond bear equal date; it is there stated that the patron had made the presentation, and the clerk had agreed to resign upon request: would it not, in the common affairs of the world, be an insult to the understanding equally of the lettered and the unlettered, to tell them that these cotemporary acts and obligations, recited in the same instrument, bearing

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date on the same day, having, from their nature, reference and relation to each other, were not the corresponding parts of one contract, but distinct and independent acts?

I would remind your Lordships of the words of Lord Mansfield, in the case of the *Bishop of London v. Ffytche*, upon this point, if it had not been done yesterday, by my brother, Mr. Justice Park. It is sufficient if the contract appears upon the bond; if it had not appeared, it might have been necessary to plead it; but in all the discussions at which I have been present upon this case, no reason has been stated, nor valid authority cited, to prove that that must be supported by averment, which is manifest without it.

I shall now proceed to explain why I think the order made by your Lordships' House, in the *Bishop of London v. Ffytche*, decides the present question. In the first place, I do not presume to examine that order further than is necessary to ascertain what it is that must be inferred from it, what are the principles on which it is founded, and what rule of decision it lays down for future Judges: to that extent I must examine it, because without such examination, I cannot apply it; but I ought to go further: it is not for me to inquire whether that resolution departed from the course of decision which had before prevailed in Westminster-hall, nor whether it is supported by those great principles of civil and ecclesiastical policy interwoven with the constitution of the state, as essential to its prosperity. These were topics properly brought into action when that case was under consideration; here, in my humble judgment, they are at least unnecessary. That cause is decided, and I am bound by it; there

I must look for the law upon this subject. To what source are we to look for what is called the declaration of the unwritten law of the land, if not to the decisions of the supreme judicature ; and upon what principle are you to expect that your decisions shall bind your posterity, in the times that are to come, if you yourselves are not bound by what your predecessors have done in the times that are past ? I take therefore the rules that necessarily flow from that decision, to be fixed and settled.

It follows from that decision, that a general bond of resignation is void and illegal ; I say general. The issue, in that case, it is true, was not upon the validity of the bond, but it involved that question : the issue was upon the presentation ; if the presentation was illegal, because of its connexion with the bond, the bond must have been illegal, because of its connexion with the presentation. If a contract be void, either as prohibited by positive enactment, or as contravening the policy of the law, the engagements on both sides must be equally invalid : if the whole contract is void, every part must be so. I refer to the case cited by my brother Hullock, yet I will take the liberty of adding one *dictum*, on account of the great names from whence it comes : the Earl of Mansfield and Bishop Stillingfleet. Lord Mansfield, in the case of the *Bishop of London v. Ffytche*, is reported to have expressed himself as follows : “ The next objection stated was, that the bond was good, but the presentation void ; that is very extraordinary, and Bishop Stillingfleet treats it as a most absurd proposition,—that it was a good agreement in respect of the bond, and bad in respect of the presentation ; and that that which was corrupt in itself, could be good in a bond and bad in a pre-

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sentation." The opinion expressed in these words, appears to me to be so clear, that I feel entire confidence that no scepticism can doubt it, and no subtlety confuse it. I assume, therefore, that a decision against the validity of the presentation, in the great cause so often alluded to, was in effect, a decision against the bond of resignation, which had been there given, or, in other words, against a general bond of resignation. The case which is my guide, having settled that a general bond of resignation is invalid, it remains for me to consider whether, upon the same principles, I am to adopt the same conclusion, as to a special bond, with the provisions contained in that now in question.

The two points which appear to me to have conducted the House to the reversal of the judgment below in that cause, are, first, that the bond was a benefit to the patron within the statute of Elizabeth; and secondly, that it was in effect an abridgment of that estate for life in the benefice which the law deemed essential to the independence of the incumbent, to the due administration of the duties of his sacred office, and which was therefore conferred upon him by the admission, institution and induction, and which for the same reasons it would not permit to be abridged by any contrivance whatever; what it was agreed should not be done directly, it would not permit to be done indirectly. That these were the chief points in debate in that cause, so far as related to its substance and its merits, I collect partly from the questions put by the House to the Judges, and partly from the opinions reported to have been delivered by such of the Members of this House as concurred in the order of reversal ultimately pronounced. The question is, whether

either or both of these objections may not be equally stated against this bond? It appears to me that both may. I think that if a general bond be a benefit to the patron, this is so also. A general bond is an obligation to resign upon request made. It is general because there is no previous condition necessary to enforce the resignation other than the request. This bond is also an obligation to resign upon request. That is the contract: but there is annexed to it a condition that the request shall not be made until a person named be capable of accepting a benefice. Is that condition wholly destructive of the benefit? The benefit may be less in degree, because many circumstances must concur instead of one; but that does not alter the nature and character of the stipulation. It was argued in the *Bishop of London v. Ffytche*, that these bonds, if they were legal, afforded an easy mode of selling the presentation after the vacancy. The argument was this: Let the clerk give the resignation bond: when the request is made, let him refuse; let the action be brought, and let the patron recover: there is a sale of the presentation authorized by the law: is not this quite as open to the same contrivance? The obligation is precisely on the same terms, with this addition only, that some person named, you cannot confine it to a son or relation, it may be any body, shall be capable of accepting the benefice. How easy to insert a convenient name. The person named becomes capable; the request is made as was intended; it is refused; the action is brought; the money paid; and the living is legally sold. Is it not obvious, my Lords, that if the argument I have referred to had any weight against general bonds, it ought also to weigh against a special bond? I have stated that in this

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bond the stipulation is the same as in a general bond. The contract of the clerk is to resign upon request. The nominee is introduced only to explain why the patron has exacted the bond, and to affirm that his object in requiring the resignation, will be to present the nominee. But when he has obtained the resignation, who can undertake that he will present the nominee, or that the nominee will accept? The capacity to accept is the whole condition. Nothing more is required to authorise the request, and with the request to entitle the Plaintiff to recover.

It appears to me obvious that these circumstances do not alter the nature and character of the benefit derived from the bond, but only diminish the amount of the value, by converting that which in the general bond is a certain advantage into a contingent advantage. A man may dispute how far, in what degree, the contingency diminishes the benefit; but no man can say that it destroys it. No such bond as this can be given without putting it upon the cards, (if I may be allowed such an expression on such a subject,) that the patron may derive great benefit from it. In this case, for instance: sustain this bond; affirm this judgment; you decide that this bond is no benefit to the patron; and you prove it by transferring by force of the bond a large sum of money into his pocket. It were easy for me, my Lords, to multiply hypothetical cases in which the patron might derive advantage from such an obligation on the part of the clerk: I shall not, however, pursue it, having, as I humbly conceive, said enough to explain the course of reasoning which induces me to think, that if a general bond of resignation be a benefit to the patron within this statute, this also must be a benefit to him; not perhaps so highly

valuable, but still a benefit, and exactly of the same character and description. The other great objection urged against general resignation bonds is, if possible, more manifestly applicable to special bonds than that which I have just mentioned. It is, that they affect the degree of interest which the wisdom and policy of the law gives to a clerk in his benefice; that is, an estate for life.

In the argument of the *Bishop of London v. Ffytche*, it is thus put: The whole estate and interest of the clerk is derived from the bishop: no part of it from the patron. He has a bare power of nomination. The law gives him no authority to diminish or vary the estate or interest conferred; to do so indirectly, is in truth a fraud upon the law, adverse to its spirit, and destructive of its views; so it was argued by those Lords whose opinions prevailed in that cause. Does not this bond also quite as evidently vary and diminish the estate conferred by institution and induction? Can any distinction be suggested in this respect between general and special bonds? I venture confidently to answer, none. The incumbent's estate is liable to be determined on the person becoming capable of accepting a benefice, and upon request, so that that is a limitation upon an estate for life. When the first condition has happened, as in this case, the bond becomes void, and the estate of the incumbent hangs upon the request: If that circumstance, therefore, is fatal to general bonds, it must be equally so to the bond referred to in the question put to the judges.

The feeling to which the opinions I have stated are adverse, arises from the effect which these opinions have in diminishing the value of advowsons, and in somewhat embarrassing patrons in the object

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of providing, by means of church preferment, for their friends or relations. Upon this I shall say only, it certainly has that effect: but in my humble judgment, that circumstance ought not to affect my opinion on the question put by your Lordships. It would be more material in a question of what the law ought to be, than in a question of what it is. Even then there are weighty considerations on the other side, but here the topic is misplaced. The answer which I give to the question put is, that I think the case decided by your Lordships rules this question, and that I must answer that this bond is illegal and void.

The *Lord Chief Justice of the Common Pleas*.—I will not detain the House by any technical observations on the point, whether the supposed objection to the bond be raised by the pleadings in this cause, because if it had been expressly stated on the record that the Plaintiff in error was presented to the living of Kettering on the condition of his giving a bond to resign, to the intent and for the sole and only purpose (in the language of the bond) that the Defendant in error might be enabled to present one of his younger brothers, when such brother should be capable of being inducted into such living, in my opinion, the bond would not have been void either by the statute or the common law. But for the judgment of this House in the case of the *Bishop of London v. Ffytche*, I will venture to say, that there never was a lawyer, from the time when tithes were first granted to the church to the present, who would not without hesitation have given the same answer. It is now, however, thought by some of my learned brothers, that resignation bonds in favour of particular persons, although sanctioned by judges, bishops, and chancellors, are void;

that the condition of resigning benefices is repugnant to the estate which incumbents have in them, and therefore bonds containing such a condition are void by the common law; that such bonds are benefits to the patron, and subject the givers and takers of them to all the penalties of the statute for the prevention of simony; that they cause the ministers of the gospel to take false oaths, and are therefore not to be endured in a Christian community. Although I most sensibly feel the weight of the authority to which my humble opinion is opposed; yet, supported by two of my learned brothers, I am vain enough to think we shall satisfy your Lordships, that such bonds are liable to none of these objections. The judgment in the *Bishop of London v. Ffytche*, has not decided, nor did the House intend in that case to decide, this question. But it has been insisted in argument, that the principle, which that case establishes, governs this. My first duty will be to show, that that case establishes no principle, which by fair legal reasoning can be applied to the present: I have not, therefore, to express the hope, which Lord Kenyon expressed, that your Lordships will review that decision; I have only to request that the principle on which that judgment rests may not be extended further than those who pronounced it ever intended it should be, and that it may not be applied to cases which cannot be productive of the evils which it was their object to remedy. Thus much I might ask, although disposed to admit what has always appeared to me repugnant to reason and authority, namely, that a supreme court of justice cannot undo what it has erroneously done. Although the courts below will not impugn your Lordships' judgments in cases *ad idem*, yet they do not hold

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that they are bound by them beyond the point actually decided. The courts below truly say, we cannot know that the House of Lords would carry this determination farther than they have carried it. In the case of *Partridge v. Whiston*,* the Court of King's Bench said, "that a bond to resign in favour of the son of the patron did not raise a point precisely like that in the *Bishop of London v. Ffytche*, and they were bound by the established series of precedents to give judgment for the Plaintiff." This decision, although pronounced on a point appearing on the record, and therefore liable to be disputed in this House, was never disturbed.

In the *Bishop of London v. Ffytche*, the point decided was, that a presentation was void which was made in consideration of a bond given by the presentee to the patron, by which the former bound himself to the latter, absolutely to resign the living on request made to him by the patron to make such resignation. The question in this case turns upon a bond given by the presentee to the patron to perform an agreement made between them, that the former would resign the living to the latter, to the intent and for the sole and only purpose that the latter might present one of his brothers when such brother shall be capable of taking an ecclesiastical benefice. The question in the case of the *Bishop of London v. Ffytche*, regarded one particular description of bonds. In the present case it regards bonds of a very different kind.

If you reason from generals to particulars, the course is easy and safe; but if you rise from particulars to generals, or draw inferences from one particular to another, you must be careful that the

* 4 Term Reports, 360.

particulars, in every material respect, resemble each other, or your reasoning will be illogical, and the analogy will fail. This is strictly true in every science, and the Bishop of Landaff, who was eminently learned in many sciences, says, in the *Bishop of London v. Ffytche*, "A slight variation in circumstances vitiates the validity of a precedent; and the ground on which it vitiates it is, that we cannot tell whether this variation of circumstances, had it been contemplated by the court which first established the precedent, might not have operated so as to produce a different judgment." We are all sensible that when the mind is suspended as it were *in equilibrio*, by the equal prevalence of opposite reasoning, in cases of intricacy, what a little circumstance would cause it to preponderate; and this little circumstance by which any case differs from an adjudged case, lessens, if it does not annihilate, the weight of a precedent. I will presently show that special bonds in favour of particular persons cannot be used for the same corrupt purposes as general bonds, and that they differ from them more in substance than they do in form. The House, in the *Bishop of London v. Ffytche*, did not go beyond the question raised by the pleadings in the cause. The question put to the judges in that case was, not whether all resignation bonds are void, but whether certain specified bonds are void? The language of the question is, whether an agreement whereby the incumbent undertakes to avoid the benefice at the request of such patron be not an agreement for a benefit to such patron? The answer of the learned Judge,* who was of opinion that the bonds spoken of in the question were illegal, is confined to general bonds to resign on request.

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He says, "In this case the patron presented by reason of an agreement that the clerk should give him a general bond of resignation, which being a profit and benefit within the statute, his presentation is void." That is the general question on the plea. Again he says, "The form of these bonds facilitates to a great degree that buying and selling of benefices which Bishop Gibson says they were introduced for the purpose of effecting. The legal history of those bonds shows how generally they have been used for that purpose." Whether Lord Chief Justice Eyre's reasoning, that because the form of these bonds was calculated to facilitate the buying and selling livings, therefore (without proof that the bond in question was intended to be used for this purpose) all such bonds are to be holden to be simoniacal, be just or not, it cannot apply to the bond in the present case. Such reasoning cannot apply to bonds, the history of which does not show that they have been used to facilitate the sale of livings, and which can only be used for such a purpose in one case, namely, where the presentation is sold to a person incapable of being presented, whilst the church is void, and a bond is taken from the clerk presented to resign when the purchaser shall be in full orders. Cases of this sort can scarcely ever occur; they must be so rare, that it is impossible to make them the grounds of a general condemnation of such bonds. It is enough that the bond may be avoided when such a corrupt use of it is proved.

The reverend prelates who favoured the House with their opinions in the case of the *Bishop of London v. Ffytche*, although they expressed doubts of the legality of bonds in any form or under any circumstances, confined their judgments to general bonds, and all their reasoning went to prove the impolicy of

general bonds only. The Bishop of Bangor says, "I am inclined to think that bonds of resignation, whether the condition be special or general, are within the express letter of the statute of Elizabeth, because it is impossible to conceive how a presentee can in any instance give a bond of resignation to a patron from which the patron will not derive some benefit or reward directly or indirectly." This is but an inclination of opinion, not a decided judgment, and I would beg to observe, that if the principle of some benefit, direct or indirect, be adopted, (a principle altogether inconsistent with the legal construction of penal statutes,) many most conscientious patrons, as well ecclesiastical as lay, have committed the detestable crime of simony. The Bishop of Bangor says, "If a bond of any sort can be said to be without exception." Except these expressions of dislike of any bonds of resignation, all the observations of the reverend prelates are directed against general, and general bonds only. The Bishop of Salisbury says, "General bonds of resignation have usually been given, and from the instant they are given, the wretched presentee is taken from under the protection of that law which guards every other subject of the state: he ceases to be free, because he holds his living at the absolute will of his patron, subject to his caprice." The Bishop of Bangor speaks always of general bonds: "Suppose," says his Lordship, "that a patron presents a clerk to a benefice, without receiving any money, bond, or assurance for money, but the clerk enters into a bond to resign on six months' notice. As soon as he is in possession, the patron demands a lease of certain tithes at an under rent." His Lordship sums up his argument by saying, "the worst and most corrupt

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practices may be carried on under general bonds of resignation." The Bishop of Landaff speaks of general bonds only. The Bishop of Gloucester says,* "A bond which conceals the consideration for which it was given, and which may easily be abused to the most oppressive and iniquitous purposes, affords a strong suspicion of a bad design. If the consideration were a good one, why is it not expressed, as in special bonds it always is, in plain words." Although these learned prelates, from a proper regard to the independence of the clergy, and a jealousy of what they thought interfered with the authority of their order, disliked all resignation bonds, yet it is clear that they only decidedly condemned general bonds. The Bishop of Gloucester distinctly admits not only of the legality, but the propriety of some special bonds of resignation.

The reasoning of Lord Thurlow goes only to impugn general bonds, "Nobody," he says, "contends that the practice is not wicked, destructive, and pernicious to the discipline of the church, and contrary to the spirit of the law under which it was carried on." "He could produce evidence of an offer to sell an advowson, upon which the purchase-money was calculated and put on a general bond of resignation, (no such arrangement could be made on a special bond,) and he knew that instances of it were frequent."† Lord Thurlow had recently changed his opinion. When the *Bishop of London v. Ffytche* came before him in the Court of Chancery, that learned Lord said, "If there were no cases, I should think it clear that a mere bond for resignation could not be criminal, unless it were a profit or benefit to the patron. Many cases have determined that these

* Cunningham, p. 151. † Id. p. 156.

bonds are good. The effect of the determination is, that they are not simoniacal, nor against the policy of the law.*" His Lordship's argument in the House of Lords, so far from proving that bonds to resign in favour of a son or brother (which no reasonable man could say are wicked and pernicious to the discipline of the church, and could be made use of to enable sales of benefices) are illegal, shows that general bonds of resignation, although under circumstances voidable in Chancery, are not void at common law. He says, "The bond is not capable of being avoided, but by averments of bad consideration and use: if you cannot aver upon it in that manner, whatever the canon law may do with it, by the common law it cannot be rescinded.†" His Lordship then compares them to marriage brokerage bonds, and says, "abundant cases may be put to show that it is impossible to avoid those bonds at law, and refers to the case of *Hall v. Potter*,‡ decided in this House, in confirmation of his opinion. If I understand this argument, it is not that every general bond is void at law; but, that it may be avoided if a bad use be made of it. Lord Mansfield says, "The case stands singly on this proposition, whether an agreement by a general bond of resignation in consideration of a presentation was, by 31st of *Elizabeth*, simoniacal, corrupt, and void?"

I hope I have clearly shown, from the pleadings, the questions put to the judges, and the opinions of the judges, and members of this House, in the case of the *Bishop of London v. Ffytche*, that the question now submitted to us by your Lordships, is not touched by the judgment in that case. It has been stated that special bonds differ only in form from

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* 1 Brown, C. C. 98. † Cunningham, 158. ‡ Id. 25.

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general bonds; that the condition to resign may be in favour of such as are neither the children nor relations of the patron; that if the names of two persons may be introduced into such bonds, the names of any greater number of persons may be inscribed. Put into a special bond as many names as you please, you can no more make it in form or substance like a general bond, than by adding equal to unequal numbers you can make the totals equal. You cannot by a special bond reduce the incumbent to the same state of dependence on the caprice of the patron as by a general bond. You cannot render it available to accomplish the sale of a benefice as you can a general bond. If a living be vacant, it cannot be sold; but if general bonds were permitted, the patron might present to the vacant benefice; take a general bond of resignation from the presentee; and when he has got his price for the benefice, call on the incumbent to resign; and thus, as Lord Thurlow says, "he may calculate the purchase-money on a general bond of resignation." The patron cannot make this calculation on a special bond, even if he be not obliged to present on the resignation of the incumbent the person mentioned in the bond, and on whose behalf the resignation is called for. If a special bond can be made use of to evade the penalties of the statute of Elizabeth, the taking it for such a purpose, if properly pleaded and proved, would render it void, and the insertion of an unusual number of names, and those persons not connected with the patron, would be evidence of such an intent.

I am not prepared to say, that the persons in whose favour resignations are required must be relations of the patron. He may honestly think that a person who, from temporary infirmity or absence, or from

his not yet being in orders, is incapable of being presented to the living, will, when the disability shall be removed, be the fittest person to fill the church. But I think, my Lords, that a patron may be compelled to present the person, for the purpose of presenting whom he calls on the incumbent to resign, and that he may thus be prevented from making an improper use of the power given him by the bond, as my Brother Gaselee has said. The Bishop may refuse to accept the resignation until he has in his hands the presentation of him in whose favour the resignation is required, or the incumbent may make a conditional resignation; such conditional resignations have been made where livings have been exchanged. Sir Simon Degge gives us the form of such a resignation, in which the Bishop is expressly required not to admit the other clerk, unless the exchange be completed; but to consider that resignation as of no effect. This agrees with the common law. Lord Coke says, "If two exchange lands, and one die before the exchange is executed, it is void."

There are several instances in which courts of equity have interfered to prevent the making an ill use of these bonds. No case is to be found of an action at law; but as the loss of a benefice is the loss of a temporal advantage, (otherwise the Court of Chancery could not have interfered,) I should think that there could be no doubt that if a patron called on an incumbent to resign his benefice to the intent and for the sole and only purpose that he might present A. B., in favour of whom the patron had a right to call on the incumbent to resign, and after having obtained the resignation by such false pretence, he presented C. D., for whom the bond did not authorise the patron to require a resignation, compensation

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for the injury the incumbent had sustained might be recovered in an action. If such an action be not maintainable, a man may through fraud sustain a temporal injury, and yet have no redress, which I apprehend would be inconsistent with the first principles of our law.

Although the validity of general bonds was supported in a great number of decided cases, there were some in which they were declared to be illegal. *Lord Keeper North* said he was not satisfied that such bonds were good in law. In the case of *Graham v. Graham*, such bonds were holden to be within the statute of Elizabeth by the Court of Common Pleas, in the 15th of *James* the 1st. Where authorities clash, a court of error, at the same time that it confirms some judgments, must over-rule such as are contrary to them: but where there is a long series of decisions, and no authority can be opposed to them, I think a court of law cannot overturn them. The legality of special bonds is supported by decisions both in common law courts and courts of equity from the time of Henry the Fourth to the present. In *Johns v. Lawrence*, it was recited on the bond that it was the intention of the obligee to preserve the presentation for his son when he should be capable of taking the living: the obligor bound himself to resign within three months after request. The King's Bench first, and afterward the Court of Exchequer Chamber, held, that a bond to resign on request if the patron will present his son thereto when he should be capable of taking the living is good. This is the decision of all the Judges in England in the 8th of *James* I. Lord Coke was then Chief Justice of the King's Bench, and in his reading on the statute of Elizabeth, he says, that he was in Parliament when that

Act passed, that he voted with the proceedings of the House, and he concurred with the other judges that such a bond was valid. Can your Lordships have so safe a guide to lead you to the true meaning of the statute as one of the most eminent lawyers that ever lived, who took a part in the making of the law, knew the evil that Parliament meant to correct, and the exact extent to which it was intended the remedy should be carried? In *Hillier v. Stapleton*, Michaelmas 1707, the Lord Keeper said, "Resignation bonds have been allowed since the statute only to preserve the living for the patron himself or for a child, or to restrain the incumbent from non-residence, or a vicious course of life." If the bond be general, his Lordship observes, a particular agreement must be proved to resign for the benefit of a friend that would be presented, and without such agreement, the bond ought not to be sued on.

In *Peele v. Capel*, 9th George I., the bond was to resign when the patron's nephew came of age. Instead of the patron's requiring a resignation, an agreement was made that Peele should hold the living, paying the nephew 30*l.* a year. This payment was made for several years, but was afterwards refused, and the bond put in force. The Chancellor granted an injunction, but said it was not on account of any defect in the bond, which he held good, but on account of the use that had been made of it.

In an anonymous case, in 13 *William III.*, *Powell, J.* concurred with Blencow, the only other judge in Court, in supporting a general bond, because he says it may be to an honest intent, as that the patron may have a son of his own capable of taking the benefice; but, says he, if this was the real motive, why should it not be expressed in the condition?

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This very learned judge entertained no doubt of the legality of special bonds, or of the justice or policy of allowing them. In *Partridge v. Whiston*, the Court of King's Bench said, they were bound by an established series of precedents to give judgment for the Plaintiff in an action on a bond on a condition to resign in favour of a son of the patron. This case might have been carried to the House of Lords, for the question was raised on the record; but the judgment was never disputed. To these decisions no judgment of any court, no *dictum* of any judge, can be opposed. The overruling of so many authorities, by any power but that of the legislature, will destroy entirely the certainty of the law: no man can know what are his rights or duties.

We talk much of national faith; I hope, my Lords, it will ever be kept inviolable. National faith is not, however, confined to any particular compacts; it requires the strict observance of all laws, under the sanction of which any of the subjects of this empire have acquired any rights. The reversal of these decisions would be a breach of national faith to those who have been induced by them to purchase advowsons. Immense sums of money have been expended in buying advowsons, and presentations, upon the highest assurance next to that of an express declaration by the legislature, that, in case of livings becoming vacant before those on whom the purchasers intended to bestow them are capable of taking orders, they might present to such living and take the security of a bond from the presentees for the resignation of them, when the person for whom they are intended shall be in priest's orders. Many of these purchasers have no other provision for their children but the livings so purchased. Ecclesiastics

as well as laymen, have dealt in these bonds of re-nation. Lord Mansfield says, "a Bishop of Salisbury, before his (Lord Mansfield's) time, frequently took them." This is not said of that right reverend relate by way of reproach, but to show that men of the highest character did not consider that the taking such bonds was improper.

If you decide that these bonds are within the statute of Elizabeth, you make those who have given and those who have taken them criminals. Both the Plaintiff and Defendant in error, and many other persons, as well clergymen as laymen, have, while acting under the sanction of the courts of Westminster, committed the scandalous crime of simony, and subjected themselves to all the penalties of the statutes of Elizabeth. This argument was answered in the *Bishop of London v. Ffytche*, by saying that these consequences of the judgment could be prevented by an Act of parliament. Your Lordships cannot have forgotten the answer of Lord Mansfield to this observation: "What! pass a judgment to do mischief, and then bring in a bill to cure it!" I will add, will you condemn men by a judgment that has all the vice of an *ex post facto* law, and after confiscating their property, save them from further punishment by a statute pardon.

But let us forget for a moment that there are any decisions on the subject. The statute of Elizabeth cannot be holden to embrace this case, without setting aside rules which, since the Revolution, have been uniformly observed by all Judges, and which temper with mercy the justice of our criminal law. The statute of Elizabeth is a penal law: the rule to which I allude, requires that all penal laws should be construed strictly; that no cases should be holden

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to be reached by them, but such as are within both the spirit and letter of such laws. If these rules are violated, the fate of accused persons is decided by the arbitrary discretion of Judges, and not by the express authority of the laws.

If general words follow an enumeration of particular cases, such general words are, by another rule of construction, holden to apply only to cases of the same kind as those which are expressly mentioned. By the 14th *George II.*, cap. 1, persons who should steal sheep or any other cattle, were deprived of the benefit of clergy. 'The stealing of any cattle, whether commonable or not commonable, seems to be embraced by these general words, "any other cattle;" but by the 15th *George II.*, cap. 34, the legislature declared that it was doubtful to what sorts of cattle the former Act extended besides sheep, and enacted and declared that the Act was meant to extend to any bull, cow, ox, steer, bullock, heifer, calf and lamb, as well as sheep, and to no other cattle whatsoever. Until the legislature distinctly specified what cattle were meant to be included, the Judges felt that they could not apply the statute to any other cattle but sheep. The legislature, by the last Act, says, it was not to be extended to horses, pigs, or goats, although all these are cattle. Lord Chief Baron Comyn says, "a penal statute shall not be extended by equity, and the general words of a penal statute shall be restrained, for the benefit of him against whom the penalty is inflicted."

By the 31st of *Elizabeth*, cap. 6, sec. 4, for the avoiding of simony and corruptions in presentations, collations and donations, of and to any benefices, dignities, prebends, and other livings and promotions ecclesiastical, and in admissions, institutions,

and inductions to the same, it is provided, that, "If
 " any persons or person shall, for any sum of money,
 " reward, gift, profit, or benefit, directly or indi-
 " rectly, or for or by reason of any promise, agree-
 " ment, grant, bond, covenant, or other assurance
 " of or for any sum of money, reward, gift, profit,
 " or benefit whatsoever, directly or indirectly, pre-
 " sent or collate any person to any benefice, with
 " cure of souls, dignity, preferment, or living ec-
 " clesiastical, the presentation, collation, gift, and
 " bestowing, and every admission, institution, in-
 " vestiture, and induction, shall be utterly void,
 " frustrate, and of none effect in law; and the per-
 " son giving or taking the money, &c., shall forfeit
 " double the value of one year's profit of the bene-
 " fice, and the person accepting the benefice shall
 " be for ever disabled from holding the same." The
 only words in this statute which can be so far
 stretched as to reach the bond which is the subject
 of the present action are "profit or benefit;" but
 these, according to the restrictive rules of construing
 penal statutes, mean only profits or benefits *ejusdem*
generis with money, rewards or gifts, such as bills
 of exchange instead of money, leases of the tithes,
 or profits of the benefice, or loans of money, or
 other valuables, for a long or indefinite period of
 time, instead of immediate gifts of the same things.
 If this construction be not put on the words, no
 patron, either lay or ecclesiastical, can present or
 collate a son who is dependent on such patron, to
 any preferment in the church, without being guilty
 of simony. If a bond for the resignation of a living
 in favour of a son, be a benefit, the presentation of
 a son to a vacant benefice, must be a benefit, for the
 first is only a means of obtaining the second;

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indeed there can be no doubt, that if a patron has a son, whom he maintains, it is generally a benefit for him to have a living to which he can present such son: for few persons would allow a son as much after he was in possession of a benefice, as he received before; but this was not that corrupt benefit which was contemplated by the legislature, when this statute was passed.

Whatever expressions are to be found in the Act, the object of the legislature was only to prevent simony; and such advantages as these were never thought to be simoniacal. Lord Chief Justice De Grey says,* "The statute has not adopted all the wild notions of the canon law, with regard to simony." But the giving or granting this bond would not amount to simony even by the canon law. The words that approach nearest to it, are those of the canon of 1229, *Nulli licet ecclesiam nomine dotalitatis ad aliquem transferre*. All the other canons are confined to the trafficking in presentations, and preventing the granting of leases and pensions by incumbents. One definition of simony, by a canonist, is, *Studiosa voluntas emendi vel vendendi aliquod spirituale vel spirituale annexum*. This definition can by no construction, be extended to special bonds of resignation, made to enable a patron to provide for his relation or friend. Another writer has defined simony to be *Spiritualium acceptio vel donatio non gratuita*. This word *gratuita* is used as the opposite to *oneraria*, and only applies to a corrupt bargain for money or other direct profit. In exchanges, each party proposes to himself some benefit; the one expects to get more profit, the other a more healthy or agreeable or advantageous residence. Yet exchanges are expressly

* 2 Blackst. 1052.

allowed by the statute of Elizabeth, because exchanges, though productive of temporal advantages to one or both parties, are not the vile corrupt contracts which were intended to be prohibited by the legislature.

But it has been said, by one of my learned brothers, this is a benefit and profit, because by means of it, money will be obtained: for if the judgments of the courts below should be affirmed, the Defendant in error will get 10,000*l*. The performance of the condition of all bonds is enforced by pecuniary penalties, which may, in the event of a breach of the condition, be recovered. This is the case when bonds are given for the faithful performance of any office; yet such bonds have been enforced over and over again, and no such objection was ever made to them. If the intent of the obligee was to obtain the penalty of the bond, and not the resignation of the living, such intent would be corrupt, and the bond made to carry it into execution would be void. That would not be a resignation bond, but a money bond; all that was said about resignation, being a mere colour to cover the corrupt intent; but this corrupt intent not appearing on the face of the bond, must be pleaded. There is no such plea in the present case, nor is there the least reason to suspect that the defendant in error ever contemplated so mercenary and so base an object. He expected that the obligor would perform the condition of the bond, and then no money or other corrupt benefit could have been offered. Is it consistent with justice or common sense, that a man is to lose his right, because his opponent compels him, by a breach of his contract, to sue for a penalty which he neither expected nor desired? Mr. Justice Heath says, in *Ffytche* and the *Bishop*

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of London, "The law construes bonds according to the intent of the parties, and in all bonds with a condition, the penalty is only considered as enforcing the condition:" so, although a patron can derive no pecuniary advantage from the presentation to a living, yet if his clerk be not admitted, the law permits him to recover damages in a *quare impedit*.

It has been insisted, that advowsons are pure trusts, and that patrons, in the execution of these trusts, have no right to consider their families or adopt any means for reserving presentation for any of their children or relations. This opinion is founded on what Lord Coke says, that "a guardian in socage does not take a presentation to a living, because he cannot make money of it." This doctrine has led to the ridiculous ceremony of the guardian putting the pen into the hands of an infant in the cradle, and guiding its feeble hand while it signs a presentation. But executors and administrators of lay patrons present to livings which have become vacant in the lifetimes of their testators or intestates. Presentations are not pure spiritual trusts: if they had been so considered, the Bishops could never have allowed them to be disposed of by laymen; advowsons in gross or next presentations could never have been permitted to be sold; Archbishops could not leave options to their widows or other lay persons.

The learned Selden calls the right of lay patrons to present to church livings, "the interest of patronage which the lay founders challenge in their new erected churches." Lord Kenyon calls a right of presentation, "a trust connected with an interest." The founders of lay patronage, when they endowed the churches, reserve

the right of patronage, and the right of taking resignation bonds in favour of their children and descendants. The Bishops, by allowing the dedication of tithes to be made on these conditions, obtained a provision for many churches which would otherwise have remained without endowment. As the Bishops were to decide on the fitness of the persons to be presented, they wisely thought that the allowing patrons the privilege of taking such bonds could not injure the Church. On the contrary, from the exercise of this privilege, the younger members of the families of great land-owners were brought into the Church, and a connexion has been kept up between the landed interest and the Church, which greatly contributes to increase the security and influence of the latter; at the same time the members of great families are generally better educated, and from those family connexions, likely to be more respected in their parishes than any other clergymen that can be found. The practice of taking special resignation bonds, and the sanction that such bonds have uniformly received from the courts of Westminster, are the highest evidence that such bonds were allowed by the original compact made between lords of manors and the Bishops, when churches were founded. These were some of the interests which Selden says the patrons challenged in their new erected churches.

It has been said, that a clerk who has given one of these bonds, cannot subscribe the proper form of resignation, or take the oath administered on his institution. The unhappy men who have taken this oath, and resigned in consequence of bonds of resignation, have been even charged with perjury. This is a dreadful charge

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against the thousands of worthy persons who have given such bonds, and honourably performed the conditions of them. The objection as to the form of resignation assumes, that the words *spontè, purè, et simpliciter* are an essential part of the instrument of resignation. There is no particular settled form of words necessary in a resignation. In *Watroux v. Pollard*,* the words are *animo deliberato, certâ scientiâ, et mero motu, et quibusdam causis justis et rationalibus moventibus, ultrò et spontè dedisse*; neither these words, nor any thing of the like import, are in the form of resignation given by Degge. But if a resignation, in this precise form were required, the only import of the words *spontè, purè, et simpliciter*, is that the clerk was not driven by unlawful violence or threats, or seduced by any corrupt agreement, to make the resignation; but that he made it willingly, and because he thought it his duty to make it. With regard to the oath, I admit that by Archbishop Courtenay's decree, persons presented are required to swear that "*obligati non sunt, nec eorum amici pro se, juratoriâ aut pecuniariâ cautione, de ipsis beneficiis resignandis.*" These words are not in the oath prescribed by the Council of Westminster, 1138, or that of the Council of Oxford, 1236. The insertion of them by the Archbishop into the oath required by his decree, shows that he and those who advised him, thought that the oaths previously taken, did not reach resignation bonds. The Archbishop had no authority to alter the oath, and if any Bishop was now to refuse to admit a clerk who declined taking this oath, he would render himself liable to damages and the costs of a *quare impedit*.

* Dyer, 293. b.

By altering oaths of office, you may alter the condition, duties and responsibilities of the officers. Parliament only can do this, in civil offices; and Councils of the Clergy, with the approbation of the King, in ecclesiastical. Lord Coke says, "a new oath cannot be imposed without the authority of Parliament." In 1603, a canon was made, prescribing a form of oath to be taken by persons presented to benefices, and this canon was confirmed by the King. The clergy who assisted at the convocation which made the canon, must have known of Archbishop Courtenay's decree, and yet they have omitted, in the form of oath, the words relative to bonds of resignation. How is this omission to be accounted for? Why either the clergy, or those who advised the crown, thought that bonds of resignation, if not abused, were legal and proper, and therefore they would not allow any oath to be administered to clerks, which should prevent them from giving such bonds. I have heard it said, Why will not patrons rely on the honour of clergymen? But if the clergy cannot give bonds, they cannot pledge their honour: if the one is a violation of their duty, inconsistent with the forms of resignation and their oaths, so is the other.

The last objection to the validity of these bonds is, that they convert an estate for the life of the incumbent, into an estate determinable on a particular event, during the life of the incumbent. Supposing that the clergyman's interests in his benefice be exactly the same as that of a lay tenant for life, there is nothing in the objection; for the condition to resign in the case of a benefice, forms no part of the instrument which creates the interest in it; it is made by a separate deed. Now if a tenant for

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life were to give a bond to convey back his estate on the happening of a particular event, such a bond would not be voidable in law. The objection is to introducing into the instrument conferring the estate, a condition which is inconsistent with it, as when a deed conveys to *B* an absolute indefeasible estate for his life ; and contains a proviso, that on a certain event, the estate shall determine in the lifetime of the party to whom it is given. There is more of technicality than reason in this distinction ; but no two estates are less like each other, than that of a clerk in his benefice and a lay tenant for life ; they are created with different objects. Conditions are annexed to one which are not annexed to the other ; the clergyman, to preserve his estate, must perform the duties of his church ; if he takes another benefice, without a dispensation, he vacates the first. These conditions arise from the original compact between the lay patrons of the Church and the clergy, which I have already referred to.

The judgment of this House, in the *Bishop of London v. Ffytche*, does not bear upon the question now to be decided. No principle can, by any just legal reasoning, be deduced from that case, which is applicable to this. Securing a benefit for a brother or friend, is not a profit or benefit within the meaning of the statute of Elizabeth. These general terms must, according to the true and established rules for construing penal statutes, be restrained by the particular words that precede them, and holden to mean any benefits of the same sorts as those particularly specified. The taking these bonds is not an abuse of the right of patronage, as that right stands according to the common law, and they are not inconsistent with the estate which incum-

bents have in their benefices. These bonds appear to have been used from the earliest times, both by ecclesiastical and lay patrons, and have been uniformly supported by the judgments of the courts of Westminster.

The consequences of declaring these bonds void, will not be confined to the injury done to the long established rights of patrons; it will bring in a laxity in the mode of construing penal statutes which will deprive persons accused of crimes, of the benefit of that humane rule, which secures from punishment all whose offences are not clearly within the letter as well as the spirit of the law. The judgments of the courts of Westminster-hall are the only authorities which we have for by far the greatest part of the law of England. The overturning the long series of judgments, which declares the validity of these bonds, must introduce uncertainty and confusion into every branch of the common law. Can it be said that the law which governs these bonds is unjust? No, my Lords, the injustice is in destroying, without compensation, a vested right. Can it be said, that they are inconsistent with the policy of our laws? That policy encourages us to provide for our children, relations, and friends, and allows us to bestow on them offices for which they are duly qualified. In ecclesiastical benefices, the public have a security for the fitness of the person presented, which does not exist in other cases. The Bishops are to take care, that neither by friendship, nor natural affection, a clerk shall be put into a church, who is not duly qualified to do the duties of it. If a patron may give a living to his son, or relation, or friend, what objection is there, if it becomes vacant when the person for

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whom it is intended is incapable of taking it, to his permitting some other person to hold it, until the incapacity of the first object of his choice be removed? It has been said, this can be done in the case of no other office. There are no other offices which have been created by patrons, and endowed out of their estates, and therefore there could be no legal origin for the right to take such bonds in any other offices. With respect to other offices, there are no judicial authorities to support such a right.

By holding these bonds to be void, you will not make patrons forget their faculties, and look out, unbiassed by affection or friendship, for the most worthy clergyman to fill the vacant benefice. Many of them will act, as some patrons have done, where a living, the presentation to which they are desirous of selling, becomes void before it is sold. They will present some old man. By which are the duties of an incumbent likely to be best performed—by a young man, in full health, under a bond of resignation, or by an old one, who has just enough of life left not to be liable to be objected to by a Bishop, on account of his imbecility? Many owners of manors, with advowsons annexed, will sell the advowsons from the manors. Those who pay large sums of money to purchase advowsons in gross, will not be the most likely persons to hold such advowsons as pure trusts, and in disposing of them to look only to the maxim—*detur digniori*. Such alienators of the church patronage will break the connexion between the landed interest and the clergy.

Young men of family are, from their education and habits, likely to make the best parish priests. From their connexion with the owners of lands in the parishes, all the inhabitants feel a respect for

them, which must add much to the effect of the instruction they give. Connexion with proprietors of the soil, gives to the clergyman the greatest interest in the happiness of his parishioners, and stimulates him to promote their spiritual welfare. Such persons will not take orders where the livings, which their ancestors founded, are severed from their families. I am aware these are rather considerations of policy than law; but, my Lords, if there be any doubts what is the law, judges solve such doubts by considering what will be the good or bad effects of their decision. I say, nearly in the words of one of the Bishops, in the *Bishop of London v. Efytcbe*, "That doctrine cannot be law, which injures the rights of individuals, and will be productive of evil to the Church and to the community."

The Lord Chief Justice of the King's Bench.—The question appears to me to consist of two parts. First, whether enough appears on the record to shew that the bond was given as the price or consideration of the presentation to the benefice? Secondly, supposing this to appear, then whether the bond is void by the statute or common law?

As to the first part of the question, I am of opinion, that enough does appear upon the face of the record to shew that the bond was given as the price or consideration of the presentation to the benefice. If the fact be manifest upon the face of the instrument, it is not necessary to aver it, in order to bring it to the notice of the Court, or within the meaning of the statute; and that the fact does so appear, it is only necessary to advert to the language of the condition.

In this case the statute mentions the act alone, without any epithet or qualification. The section

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commences with this preamble, "for the avoiding
 " of simony and corruption in presentations, colla-
 " tions and donations, of and to benefices, dignities,
 " prebends, and other livings and promotions eccle-
 " siastical, and in admissions, institutions and in-
 " ductions to the same, be it enacted, that if any per-
 " son shall, or do at any time" (after such a period,) "for any sum of money, reward, gift, profit or be-
 " nefit, directly or indirectly, or for or by reason of
 " any promise, agreement, &c., of or for any sum of
 " money, reward, gift, profit or benefit whatsoever,
 " directly or indirectly, present or collate any person,
 " &c. to any benefice, that then such presentation
 " shall be utterly void." It is to that section to which
 I would beg to call your Lordships' attention, from
 which it appears that the mere taking of any gift, profit
 or benefit, is in itself an avoidance of the presentation.

It is necessary, with respect to any question
 that may arise upon the statute of Elizabeth, or
 any question that may arise from the common law,
 to see what the fact is; the question being, Whether
 it is apparent upon the face of the instrument that
 the bond is given as the price of the presentation?
 It seems to me impossible for any person to read
 the condition of this bond as it appears upon the
 record, without taking it that it was given as the
 price of the presentation, and that the presentation
 was given as the consideration of the bond. It
 begins with reciting "that Lewis Richard Lord
 " Sondes is the patron of the rectory, which rectory
 " had become vacant by the death of the late incum-
 " bent." The next recital is, "that Lord Sondes by
 " writing under his hand and seal, bearing equal
 " date with the above written obligation, presented
 " the above bounden Brice William Fletcher, to

"supply the vacancy" from which it appears that the presentation and bond are connected together, and then it goes on, "And whereas the said Brice William Fletcher has agreed to resign the said rectory into the hands of the proper ordinary, upon such request or notice as hereinafter mentioned, so as that the said rectory may thereby again become vacant:" can any person read this and not conclude, that the presentation and the bond were concurrent acts; that they were founded upon a prior agreement to resign? This was undoubtedly the opinion of Lord Mansfield, in the *Bishop of London v. Ffytche*. That being so, for the reasons which I have just stated, I am of opinion, that there is enough upon the face of the record to show that this bond was given as the price of the presentation.

The second inquiry which arises is, whether such a bond, given as the price or consideration of the presentation, is void in law. Upon this question, I conceive the true inquiry to be only, whether this bond is within the rule and principle of the decision in the case of the *Bishop of London v. Ffytche*. I conceive that case to have established a rule and principle binding upon all jurisdictions, except that of your Lordships' house. It is true that the question there arose directly upon the presentation, and not upon the bond, but it is treated throughout as being one and the same: as the presentation and the bond are the price and consideration of each other, it seems impossible to say, that the one can be good and valid, and the other bad and void.

That case arose upon a presentation accompanied by a bond to resign upon the request of the patron; it was what is called a general resignation bond.

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The present case arises upon a presentation accompanied by a bond to resign upon request, "whereby, and so as that the patron may be enabled to present one of his two brothers, (in the condition named,) "when such of them as is to be presented, shall be capable of taking an ecclesiastical benefice;" the agreement having been, that the presentee shall so resign, to the intent that the patron may present one of those two persons. This therefore is one of those that have been called special resignation bonds.

The declared object of the resignation, is the presentation of one of the two persons named; but as the resignation of the incumbent must precede the presentation of another clerk, I am at a loss to know how the presentation of the particular clerk is to be secured or enforced, or the incumbent restored to the benefice, if the patron, after having declared his intention to present one of the nominees, shall afterwards think fit to present another person. This would undoubtedly be a most dishonourable act, and I beg to be understood as not even surmising that the noble Lord, who is a party to this suit, would act in this manner. But, in deciding upon a question of law, your Lordships cannot look at the rank and character of particular persons. It has been said at the bar, that a court of equity may prevent an ill use from being made of such a bond. I do not presume to say that this may not be done, if the intention to make an ill use be known and ascertained before resignation. My difficulty is to see how this can be known and ascertained, unless a patron should be weak enough to avow it, and this cannot be presumed. If a person should act in the way I have supposed, and if after resignation the

patron should present another person, how could the ordinary refuse institution? Suppose the presentee to die in the interval between resignation and the new presentation, or that he should obtain a better benefice, and not tenable with this, and, on that, or any other account, refuse institution, how is the incumbent to be restored, though the objects of his agreement and of his resignation have failed? If these difficulties cannot be overcome, then the bond in question will enforce a resignation, whenever one of two persons named shall be capable of taking a benefice, leaving the patron at liberty, in many, if not in all cases, to present whom he will.

But, supposing these difficulties can be overcome, or be thought not really to exist, and the bond be considered as only enabling the patron to present one of his two brothers; still I am of opinion, upon the authority of the decision so often mentioned, that this bond is void in law. That decision may be considered as founded principally upon one or other of two reasons, or perhaps upon both the reasons; being either that the bond there mentioned was within the statute of Elizabeth, and so void by that statute, or that the effect of the bond was to convert into an estate at will, an office which the law considers to be freehold, and so the bond is void at common law.

I consider the bond now in question, to differ from the general bond in degree only, and not in principle or kind. If it be a benefit to a patron to be able to call for a resignation whenever he may choose to present any other person, it must, in my opinion, be a benefit, though, perhaps, a less benefit, to be able to command a resignation, in order to present a relation or friend, and if there be any benefit, the

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degree of benefit must be immaterial, and the case will be within the statute. If the law will not allow a benefice to be held at the will of the patron, and voidable whenever he may choose to present any other person, the law cannot allow a benefice to be so held, as to be voidable when a relation or friend of the patron may be capable of taking it, and the patron may think fit to present him: for, in each case, the estate or interest of the incumbent will be less than a freehold, whereas a benefice is spoken of as a freehold in all our books, whatever it may have been in its origin, or first constitution, which are now lost in the obscurity of antiquity.

But further, it is not only required that a benefice shall be freely given, and freely taken, but if resigned, it must be freely and voluntarily resigned; *non metu coactus sed spontanea voluntate*, and how can a resignation be voluntary which is made in order to avoid the penalty of a bond, whether a patron has a right to impose the penalty at his pleasure, or only for a particular purpose? Ought the law to sanction an instrument which places a clergyman in a situation, either to subject himself to a demand which he may be unable to pay, or to make a solemn declaration contrary to his conscience, and to truth? In my opinion, the law ought not to permit this.

Again, my Lords, the bond in question enables the patron to command a resignation in favor of one of his two brothers. If such a bond should be held valid, where is the line to be drawn, or what limit is to be fixed? If it be good in favor of brothers, why may it not also be good in favor of cousins or more remote kindred, or of friends? If it be allowed

in favor of two persons, why may it not be allowed in favor of more than two ; of twelve, of twenty, or even of a greater number ? I am unable to discover any rule or principle upon which it can be said, " thus far shalt thou go, but no farther." I infer, therefore, that no step must be taken towards the accomplishment of an object, which may reserve any benefit of this nature to the patron, or make the interest of the incumbent less than that freehold or estate for life, (to be forfeited only for misconduct, or by a regular judicial proceeding,) which the law supposes him to possess, and requires that he shall be permitted to enjoy.

For these reasons I am of opinion, that enough appears upon the face of this bond, to show that it is void and illegal.

The Lord Chancellor.—Upon the first question which arises in this case, I am most clearly of opinion, that enough does appear upon the record, to enable your Lordships to say, whether the bond in question is void or illegal, either by statute, or common law. I feel very great satisfaction, that this question is now in the course of determination, by the highest court of judicature in this Kingdom ; because that decision, speaking for myself, will greatly tend to relieve my mind from doubts, which I have entertained when applications have been made in the Court of Chancery, with reference to these special bonds of resignation ; for I could never bring my mind to that satisfactory conclusion, which perhaps it was my duty to do. Before I should have proceeded to take any step in such a case, the question, with respect to these special bonds of resignation, should have been deliberately argued and deliberately adjudged, by a court of common law : for I cannot but very much doubt whether much at-

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tention ought to be paid to those decisions which have passed without argument at the bar, and which passed without a word having been said by the Court. Such was the case with respect to this very cause, in the court where it was originally considered, as well as in the inferior court of error; for I do not understand that a word was said upon it either by counsel or judges. That being so, a writ of error was brought to this House, and the question has been most ably argued at your Lordships' bar. After having heard that argument, it has been spoken to by the learned Judges, in such a manner as well justifies me in saying it was a subject which would have borne much debate in the court below; and therefore after it has been spoken to with so much ability by the different judges, who have had the opportunity of giving a year's consideration to it, I trust that your Lordships will not think it an unreasonable request, to ask that a few days more should be permitted to elapse, before the motion is made, calling upon the House to proceed with its judgment.

On Wednesday, May the 17th, 1826, it was moved and ordered, that the further consideration be adjourned to the next Session.

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The Lord Chancellor.—This is a question of very great importance, a question not to be looked at merely with respect to the parties to this appeal; but because it may perhaps be thought expedient, if the judgment, which the House shall pronounce, shall declare the bond, the validity of which is in question, to be void, that some protection should be given by a law to those who have been led by pre-

vailing notions to believe that bonds of this nature were valid.

(Here the Lord Chancellor stated the facts and pleadings.)

The case was first argued before the Court of King's Bench, (in the absence of the Lord Chief Justice,) before three of the judges, who stated that this was a case which did not fall exactly within the case of the *Bishop of London v. Ffytche*; that it was therefore fit to be heard upon writ of error in the House of Lords, and that Court did no more than give it due passage to the House of Lords, by giving a judgment without argument, in favor of the Defendant in error. This course of proceeding is not very satisfactory. The case then proceeded, by writ of error, to the Exchequer chamber, where the Court, consisting of eight judges, also gave judgment without argument, in favor of the Defendant in error, merely for the purpose of giving the case a passage to this House. The question we have now to determine is, whether this is a bond upon which the obligee can be effectually sued; whether it is such, regard being had to the principles laid down in the case of the *Bishop of London v. Ffytche*, looking at what is the actual Condition of this bond.

Addressing your Lordships as one of the Courts of justice, and not as a legislative body, it is my duty not to argue or state this case now on any other grounds, than grounds of law. If the state of the law upon this subject is such, that your Lordships, looking at it as legislators, deem it fit that an act should be passed to relieve against the law, that consideration ought not to affect, and therefore cannot affect your Lordships decisions as judges.

Before the decision in the *Bishop of London v.*

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Ffytche, this bond might have been held to be legal. But I have no difficulty in saying, that after this House has declared and decided, as it did in the case of the *Bishop of London v. Ffytche*, as to general bonds, I conceive myself bound to apply the principles of that decision to this case, because it appears to me perfectly impossible to say it is any thing but a general bond. According to this bond, although A. or B. shall be capable of taking the living, looking at the legal effect of the condition, there is not one single syllable from the beginning to the end of it, which, after resignation, compels the obligee of this bond to present either A. or B. Some of the judges, who gave their opinions in favor of the bond, were so distressed by this, that the best answer they could make to it was, that true it is, that when the resignation is accepted, there is no obligation whatever upon the patron to present the clerk, but the Bishop must take care that the resignation and presentation shall go together. How the Bishop is to do that, is difficult to imagine; because, if the presentation is sealed and signed, before the resignation is complete, it is in law a void presentation; if on the other hand, it is to be signed and sealed after the resignation is complete, then I wish to ask, whether there be any Court of law, or any Court of equity in this country, which, after the resignation is complete, can compel the party to present either A. or B., because the professed intention of the resignation was, that A. or B. should be presented.

If this is a bond, which can be said to be of a special nature, it must be on this ground that the resignation is to have its effect, if A. or B. is presented. It has been decided in a case which has been reported that, if the clerk in possession execute an instrument of resig-

nation, and there is expressed in it the condition that if A. or B. are not presented within six months the resignation shall be void, there is no valid resignation, because the resignation must be *puré, simpliciter, absoluté, et sine conditione*.* The consequence of that is, that the resignation itself is void. And if this is so, what is expressed in the condition of the bond cannot be expressed in the Condition of the instrument of Resignation. I say further, that if the bond is invalid, unless the patron can be compelled to present one of these nominees, there is no Court that can oblige the patron to present either of these nominees; and if that be so, the consequence is, that in order to fill up that vacancy, he may present any clerk he thinks proper. If that be a correct view of the case, it falls absolutely and entirely within the doctrine of that case of the *Bishop of London v. Efytcbe*. With respect to that authority, I apprehend that, whatever may have been thought of it out of this House, I may humbly state my opinion, and I have always thought that it is a sound decision. The doctrine established in that case was, I must admit, certainly never thought right by some great judges. Your Lordships, however, are bound by that decision, unless there be some special circumstances to take this case out of the principle of that case; and unless I am wrong in the representation I have made, the peculiar construction of this bond, instead of taking it out of the principle and application of that case, brings it directly within it.

If this bond be a simoniacal bond within the intent and meaning of the law, subjecting to harsh consequences the patron or parson, or both, it is our

* See Burn's Eccl. Laws, tit. Resignation, and the books there referred to.

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business not to regard the consequences more than the law will allow us to attend to them ; and we cannot pronounce against law to avoid the consequences of a decision, which is according to law.

I have looked attentively at the cases in the books on the subject. Those cases are not very well considered if the reports are correct, but stating them altogether, let us see what they amount to. One case decides, that resignation may be in favor of a son,* another authority supposes that you may have it for a kinsman or friend.† I want to know therefore, what is either the number or the character of the persons, in favor of whom such conditions can be said to be legal : if you can take it for a son, you may take it for a grandson, and for great grandsons ; in short, you may take it on behalf of any body who stands within the relation that a son bears to you, and in the relation that a friend bears to you, and if you can name one son or one friend in the condition of the bond, I wish to know what is the number of sons or friends that you may not name, and where the limit is to be placed ? Some cases say, we doubt whether you can provide for a resignation in favor of a cousin or relation ; but we think it must do for a son, because the father is bound to provide for the son. Is that a reason which is satisfactory in a case where the policy of the law, as it regards the ecclesiastical constitution of the country, forbids such a proceeding ? What is the extent of this obligation ? If, because I am under an obligation to provide for a son, therefore, I may take such a bond, being also under an obligation to provide for myself, can I take a bond to resign in favor of myself ? If a bond of this sort

* *Johns v. Lawrence*, *quâ supra*.

† See *Wats. Incumb. c. 5.* and *Hilliard v. Stapleton*, *Ca. Eq. Abr.* 86. pl. 3.

can be taken, this consequence must follow, that if there be a patron of age to contract, having a living to which, if he were of an age to take priest's orders, he could collate himself, on this notion of the duty of providing for himself, he might present a clerk, taking from him a bond to resign when he, the patron, is four-and-twenty. I apprehend that is not the law. Looking at the condition of this bond, independently of all the consideration that belongs to the cases prior to the case of the *Bishop of London v. Efythe*, I say that the condition of this bond is, in the construction of the law, a condition, such as belongs to a general bond, and not to a special bond.

There are a great many other provisions in what are called special bonds, some very provident and commendable; but whether they are as clearly legal may admit of question, more especially if they give a sort of jurisdiction to a patron, which the law has vested only in the ordinary.

There was a good deal of argument, whether this bond can be considered as a benefit to the patron, within the intent and meaning of the statute of the 31st of *Elizabeth*. Now only consider what may be done with a bond of this kind in point of pecuniary benefit; I mean a bond with such a condition as this. If these bonds are lawful, when a living is vacant, a patron wishing to sell the next presentation, has nothing to do but to present a clerk, taking from him a bond to vacate the living whenever C. D. shall be inclined, or shall be able to take it; but yet containing nothing that could compel him to present C. D. The patron calls upon his clerk to resign the living; no, says he, I will not resign the living, because it is worth more than the penalty in the bond. The patron therefore, if resignation is refused, receives the sum mentioned in the penalty for the

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presentation of a clerk who will not resign. He cannot sell the presentation to a living when vacant—but he may present a clerk, taking a bond of resignation in a large penalty, and the Church being full, he may then sell the next presentation, and call upon that clerk who had given the bond to resign. It must be ill managed if he does not baffle Courts of Equity. In both cases, therefore, with a little management in the shape of penalty or sale, he may secure a benefit to himself.

It must, however, be admitted, the case of the *Bishop of London v. Ffytche*, and this case, if it should be classed under the same principle, may have a serious operation upon many patrons, and many clerks; and where there has been a common error, although it cannot make law against the positive words of an Act of Parliament, I should concur in any measure to indemnify persons, who have been acting on the sanction of what may be called errors of lawyers and judges. This may be effected by some law giving a power to the owners of advowsons, to discharge those obligations which are contrary to law, and substitute others which may be legalised by a statute so framed as to express the number of persons in favor of whom the condition is to operate, and making it compulsory on the patrons to present those nominees. This should be effected without trenching upon the general principles of the ecclesiastical law of the country, further than the just claims of those, who are interested, and who are likely to suffer by such errors, may make it reasonable that you should trench upon it.

It is upon these grounds that I think that this bond cannot possibly be upheld; that it is void by statute if not by common law. With regard to the obligation of the common law upon this subject, it has always appeared to me to be a very singular thing, that when

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you are discussing a case which is to determine what is the effect of the act of a clergyman, connected with that of a layman,—the layman's act is not to be considered with reference to the question, whether the clergyman bound by his canons, can or cannot legally do the act, to which the layman is a party, taking the benefit of that act. The oath which the clergyman takes when he is presented to a living, is material in the consideration of this question. I do not go so far as some judges of great authority, in saying that these are bonds which no honest clergyman would give, and no honest patron would take. We know that many very honest people have engaged in such transactions. I am content with representing that, according to my humble judgment, such bonds are illegal. Whatever may be the law with respect to bonds conditioned to do things which are but the performance of ecclesiastical duties, not being contrary to the policy of the law, but assuming in effect a jurisdiction which belongs to the ordinary and not to the patron, it is unnecessary on this occasion to call your attention to such cases. It is only to be observed, that such bonds are said to be in furtherance of the law, and not in violation of law. I have no hesitation, however, in stating, that it would not be impolitic by legislative enactment, to declare the law, and what it is as to such cases. I abstain from entering upon considerations of policy—as to such, referring only to the arguments of counsel, and the opinions of the judges in the case of the *Bishop of London v. Ffytche*.

Upon the grounds I have mentioned, it is my intention to move your Lordships to reverse this judgment.

9th April, 1827. Judgment reversed.

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After the judgment, the Archbishop of Canterbury, having observed that, according to the existing laws, a great number of patrons and incumbents, acting under an erroneous impression, had exposed themselves to severe penalties, brought in, and moved the first reading of a bill, the substance of which, was afterwards passed into a law, by the statute 7 and 8 Geo. 4. c. 25; which, reciting the statute 31st Elizabeth, c. 6, and that a practice had generally prevailed, of giving and taking special bonds or contracts for resignation of spiritual offices, and reciting the judgment of the House of Lords, that such bonds are within the meaning of the statute of Elizabeth, and that the parties to such contracts would suffer great hardship by the operation of the law; it is enacted, (sec. 1.) that no presentation to any spiritual office made before the 9th April, 1827, should be void on account of any agreement to resign, when another person specially named should become qualified to take the office, and that the parties to the agreement should not be subject to any penalties, &c. on account of the agreement; and that (sec. 2.) engagements made before 9th April, 1827, for resignation in favor of one person named, or of two persons named, shall be valid, notwithstanding the statute. But (sec. 3.) the protection is not to extend to engagements not made *bond fide* for the purpose expressed in the preceding sections; and the statute is not to be construed as compulsory on the ordinary, to accept the resignation, and by (sec. 4.) it is provided, that if the person specially named in the engagement, be not presented within six months after resignation, that the person having resigned, shall be deemed to be in possession of the spirituality, and the resignation shall be void.

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(COURT OF CHANCERY.)

WILLIAM LOPDELL, Administrator of }
CHRISTOPHER LOPDELL, Deceased - } *Appellant.*

ROBERT CREAGH, a Lunatic, by his }
Committee - - - - - } *Respondent.*

After an appeal against a decree of a Court of Equity had been presented to the House of Lords, and the cases printed, with an Appendix of evidence as entered in the Register's notes, of the proofs read on the hearing; an order was made upon motion in the Court below, expunging part of that evidence as entered by mistake. This order was reversed as irregular. In such case the proper course is to apply to the House, by petition, for leave to proceed in the Court below to rectify the mistake.

BY the decree made on the hearing of this cause, on the 30th of June, 1823, it was ordered that the Appellant's Bill should be dismissed, with costs.

On the 16th day of February, 1824, the Appellant presented an appeal from the decree; and printed copies of the case of the Appellant were prepared and delivered during the session. To the printed case of the Appellant was annexed an appendix of the Register's notes, containing the proofs made at the hearing of the cause, among which was an entry as follows:—"Order 23d July, &c. Creagh, a Lunatic, read; like 9th Nov. 1802, and 19th Nov. 1803 in same, read; affidavit, R. Creagh, sworn 14th Jan. 1812 in same, read, &c. Abstract receipts of R. Creagh, No. 16, read."

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The appeal was set down for hearing *ex parte* against the Respondent.

The Respondent did not prepare or deliver any case until the 16th of March, 1825, when, upon his petition he was permitted to lay the prints of his case upon the table. The printed cases were shortly afterwards exchanged between the Appellant and Respondent.

After the exchange of the printed cases, on the 16th of May, 1825, an application was made to the Lord Chancellor of Ireland, by way of motion, on behalf of the Respondent, that the notes made by the Register at the hearing of the cause, might be rectified by the Register, by striking out the words, "and on the 19th December, 1803 in same, read;" the words, "Affidavit of R. Creagh, sworn 14th January, 1812 in same, read," and also the words, "Abstract receipts of Richard Creagh, sixteen, read;" it being alleged that none of the documents alluded to were read at the hearing of the cause; whereupon, and on reading the pleadings and attested copy of the Register's notes on the hearing; the printed case of the Appellant, with the appendix thereto, as furnished for the hearing of the appeal in this cause;—an affidavit made by Barry Collins, Gent.;—an affidavit made by the Appellant;—and the three documents therein-before specified, as being read on the hearing of the cause, and hearing what was offered on the part of the Appellant, the Lord Chancellor was pleased to order that the notes be varied by the Register, by striking out the words, "and of the 19th December, 1803 in same, read;" the words, "affidavit of R. Creagh, sworn 14th January, 1812 in same, read;" and also the words, "abstract receipts of

Richard Creagh, No. 16, read," as was desired by the Respondent.

Against this order the Plaintiff appealed.

For the Appellant:

Mr. Brougham, Mr. Merivale.

The documents were read and received as evidence at the hearing of the cause, and were then marked and entered by the officer of the Court, as having been read and entered. It was not competent to the Court to order the proofs so entered to be expunged, except upon a re-hearing of the cause.

If it was competent to the Court, upon any ground alleged subsequently to the decree, to order the documents to be expunged without a re-hearing, no such ground existed in this case, inasmuch as the documents were good evidence, and were fit and proper to be received as such by the Court at the hearing of the cause. After an appeal is presented, no alteration of the decree or entry of proofs as read in the cause, can be made without the permission of the Court of appeal.

For the Respondents:

Mr. Sugden, Mr. Pepys.

The order appealed from, is not a judgment of the court below, from which an appeal ought to be entertained, but merely directions to the officer of the court below, respecting the manner in which the judgment of the court, on hearing the cause, ought to have been drawn up.

If the order had not been pronounced, it would have appeared as if the several documents had been read on the hearing of the cause, unobjected to on the part of the Respondent; and the cause would consequently have been heard on appeal upon evidence, not admissible in point of law against the

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Respondent, and different in point of fact from that upon which the cause had been originally heard and decided by the Court of Chancery in Ireland.

The propriety of the order appealed from, depends upon the fact, whether the documents in question were or were not, read at the hearing of the case; and that they were not read, is proved beyond all question, by the affidavit of Barry Collins, and by the attested copy of the notes on the hearing, and above all, by the recollection of the learned judge, by whom the cause was heard and decided.

June 29, 1827. *The Lord Chancellor.**—In the case of *Lopdell v. Creagh*, there was an appeal from a decree of the Lord Chancellor of Ireland, which was heard upon the merits some time back, and upon which your Lordships were of opinion, that the judgment of the Lord Chancellor of Ireland, should be affirmed. After that appeal was lodged in this House, and the printed cases were laid upon the table, an application was made to the Lord Chancellor of Ireland, to vary the notes which the Registrar had taken of the evidence which had been read upon the hearing, and the Lord Chancellor of Ireland, made an order expunging from the notes of the Registrar a part of the evidence which was supposed to have been read upon the hearing. From that order of the Lord Chancellor of Ireland, there was an appeal to the House of Lords, which came on to be heard at the same time when the appeal upon the merits was heard.

It was not necessary to decide this point of form previous to deciding the general question upon the

* Lord Lyndhurst. The judgment in this case was not delivered until after the hearing and judgment in the case next reported.

merits, but your Lordships were of opinion, that it would be convenient and desirable to consider what was the practice in cases of this description. I should submit to your Lordships, that after the appeal was lodged here, and while it was waiting to be heard, it was not competent for the Lord Chancellor of Ireland to make such an order, but that the regular course would have been, to have applied to the House, and your Lordships would, in all probability, on such application, have given leave to the party to apply to the Lord Chancellor of Ireland, and then the alteration would have been made by the Lord Chancellor, under the direction of this House. That not having been done, I conceive that that which was done is irregular, and that the appeal should be allowed; it is not at all material in its bearing upon the other case, but the proceeding was irregular, and the appeal should be allowed without costs.

Judgment reversed.

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(COURT OF CHANCERY.)

WILLIAM LOPDELL, Administrator of - } *Appellant.*
 CHRISTOPHER LOPDELL. - - - }

ROBERT CREAGH, a Lunatic, by RODE - } *Respondent.*
 RICK CONNOR, his Committee. - - - }

A. having granted to B. a lease, with a covenant for payment of the rent of 90*l.* and a clause giving a right of surrender to the tenant, dies, leaving C. his heir at law, who becomes seised of the lands subject to the lease. D. a near relative of C. having by some means acquired or assumed a title by indentures, dated in 1791, demises the lands to L. In 1793, C. is by inquisition, found to have been a lunatic from 1786. In 1797, upon a rental and account filed by the Committee of the lunatic, L. is returned as the tenant, and a sum of money is stated to have been received, and a sum of money to be due from him as rent. In 1802, D. is returned as tenant of the lands, by the receiver appointed in the lunacy. In 1811 an order is made in the lunacy, that 720*l.* being due from D. as tenant, a distress should be levied on the lands. In 1817, the receiver died indebted to the estate, and his sureties were discharged from their recognisance on payment of part of their debt, by way of compromise.

In 1820, an ejectment was brought against D. to recover the lands for non-payment of rent, and a verdict and judgment obtained. In 1821, an action is brought upon the covenant in the original lease against the Appellant as personal representative of B. to recover 2340*l.* being 26 years arrears of rent, to which action the Defendant pleaded a surrender, eviction, &c. upon which a verdict is found for the Plaintiff, and judgment entered. In 1822 a bill is filed by the Defendant in the action, stating a case of laches, and of fraud and collusion between D. the relative of the lunatic, and his committees and receivers, and praying an account against the committees and receivers, (not being parties to the suit,) or if, from lapse of time, such account could not be taken, then a perpetual injunction against proceeding on the judgment. The bill was dismissed with costs upon the hearing in the Court below, and that decree upon appeal affirmed with costs.

PEIRSE CREAGH the Respondent's father, in 1762, demised lands to Christopher Lopdell, his heirs and assigns, for three lives, at the yearly rent of 90l.; the deed of release contained a covenant for the payment of the rent during the term, and also contained an annual clause of surrender after the expiration of the first three years.

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Christopher Lopdell entered into, and continued in possession of the premises until the year 1790.

Peirse Creagh died in 1779, leaving the Respondent his eldest son and heir at law, who thereupon became seised in fee of the reversion of the premises, subject to the lease.

Richard Creagh, the brother by the half blood of the Respondent, having by some means acquired or usurped a right, or as the agent* of the Respondent, by an indenture dated in April 1791, demised the premises to James and Andrew Lysaght, for three lives, reserving a yearly rent of 100l.

James and Andrew Lysaght were in possession of the premises from the date of the indentures, until eviction for non-payment of rent in the year 1821.

By an inquisition, bearing date the 21st day of August 1793, the Respondent was found to be a lunatic, and to have become so in the month of March 1786. In December 1793, Stephen Darcy was appointed committee of the estate of the Respondent.

In 1797, Stephen Darcy filed a rental and account of the Respondent's estate, in which James and Andrew Lysaght are named as tenants of the lands, at the yearly rent of 90l.; and in the account, rent is

* An attested copy of the registered memorial of this lease was in evidence in the cause. It does not appear in the memorial that the lease was executed by Richard Creagh as attorney or agent.

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stated to have been received, and rent also to be due from them.

Stephen Darcy died in 1801, and Stuart King, then one of the masters of chancery, was appointed committee of the estate of the Respondent, and continued to act as such until the year 1820, when he resigned his office of master, and Roderick Connor, who succeeded him as master, was appointed committee in his room.

In 1802, William Croker was appointed receiver of the estate of the lunatic, and continued to act until his death, in 1817, when George O'Callaghan was appointed in his room.

William Croker, in the accounts filed by him, returned Richard Creagh as tenant, and died indebted to the estate of the Respondent in respect of his receipts.

On the 23d of July, 1811, an order was made in the lunacy of the Respondent, that 720*l.* being due from Richard Creagh, as tenant, a distress should be levied on the lands, for non-payment of the rent.

In 1812, Richard Creagh made an affidavit in the lunacy, that he never had been tenant, or in possession of the lands; and the order was not enforced.

William Croker, shortly after his appointment as receiver, entered into a recognizance with sureties, (who are since dead,) duly to account for his receipts, and to pay in the balances.

In 1817 Croker died indebted to the estate of the Respondent for rents received, but whether from the estates in question did not distinctly appear. In 1820, on the petition of the committee, an order was made, under which proceedings were taken against the sureties of the receiver; and in 1821, under

another order, a sum of money having been paid upon a compromise proposed by the sureties and approved by the master, the recognizance was vacated as to those sureties.

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In 1820, an ejectment was brought against Richard Creagh, for non-payment of rent, and possession of the lands was recovered.

In 1821 an action was brought in the name of the Respondent, against the Appellant, as administrator of the original lessee, C. Lopdell, to recover a sum of 2340*l.*, the amount of twenty-six years' rent of the lands. To the declaration in this action, the Defendant among other things put in pleas of surrender, eviction and *plene administravit*, on which issue being joined, the cause was tried in 1822, when a verdict was found for the Plaintiff on all the issues. Upon the trial, the counsel for the Respondent relied upon the conveyance to Christopher Lopdell, as having been a subsisting and binding instrument, until the eviction under the ejectment for nonpayment of rent, and gave evidence of his having obtained possession of the lands under the conveyance, and that he continued in such possession until the year 1790; and the Appellant having proved on the trial, a warrant of attorney to enter judgment on a bond dated the 12th of April 1790, executed by the Respondent and Richard Creagh, for a principal sum of 309*l.* payable to Christopher Lopdell, as evidence that the Respondent had lucid intervals after the month of March 1786, the time at which he was found to have become a lunatic; the Respondent gave in evidence a judgment entered in pursuance of the warrant of attorney against Richard only, for the penal sum of 618*l.*, the principal sum of 309*l.* being alleged to be the consideration agreed to be

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paid by Richard Creagh to Christopher Lopdell, for the assignment of his interest in the lands. On the trial it was further proved on behalf of the Appellant, that Richard Creagh executed the indenture of 9th April 1791, to James and Andrew Lysaght, thereby reserving to himself and his heirs the yearly rent of 100*l.*; and it was further proved, that James and Andrew Lysaght paid to Richard Creagh a sum of 200*l.* as a consideration for the conveyance.

The Appellant having made an application to the Court of King's Bench, to set aside the verdict, which the Court refused, in Trinity term 1822, judgment was entered.

The Appellant, in 1822, filed a bill in the Court of Chancery in Ireland, stating the facts before mentioned, and charging laches and collusion between Richard Creagh and the parties managing the estate of the lunatic, and particularly that no rent was demanded of the Lysaghts or C. Lopdell, or his representatives, nor enforced by the receivers against Richard Creagh, although there was always a sufficient distress upon the lands to recover the rents. The bill prayed that an account might be taken of what Stephen Darcy received or might have received out of the lands, and an account of what William Croker received or without wilful default might have received out of the lands, or what was received or without his wilful default might have been received by George O'Callaghan out of the lands, and that credit might be given for the same to Plaintiff, or if by lapse of time, or the contrivances of Stephen Darcy, William Croker or George O'Callaghan, such accounts could not be taken, then that Robert Creagh might be perpetually restrained, by injunction, from proceeding on the judgment obtained by

him for recovery of the rent found to be due by the jury before whom the action of covenant was tried.

The Respondent, by his committee, having answered the bill, the Appellant moved the Lord Chancellor, by way of appeal from an order of the Master of the Rolls, to continue the injunction until the hearing, and thereupon it was ordered that the injunction should be continued until further order, the Appellant undertaking to give security by his own recognizance before one of the masters, in the sum of 180*l.* (the amount of assets found at law to have come to his hands,) conditioned to abide the decree to be made in the cause.

Issue having been joined, and witnesses examined, the cause came on to be heard on pleadings and proofs, on the 30th of June, 1823, before the Lord Chancellor, when the bill was dismissed with costs, and the injunction dissolved.

From this decree the appeal was presented.

For the Appellant :

Mr. Brougham, Mr. Merivale.*

There is no evidence that Christopher Lopdell ever was in possession of the lands since the year 1791, or that James Lopdell as administrator, or the Appellant as administrator *de bonis non*, were ever called upon, from that time, until the time of bringing the action of covenant in Hilary Term, 1821, either under the covenants in the lease, or otherwise, in respect of the rent of the lands, although

* In opening the appeal, Mr. Brougham submitted that it ought to stand over till the question which was the subject of the preceding appeal had been decided. But it was suggested by the Respondent's counsel, that in argument it might be assumed that the evidence was read as entered in the Register's note, and thereupon the appeal proceeded.

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such rent was, during the whole, or most of that period, in arrear, and unreceived; and James and Andrew Lysaght, and afterwards Richard Creagh, being successively, in the rentals filed, and accounts passed by the several receivers, named as tenants of the lands to the Respondent, and from the several other circumstances of this case, as proved on the part of the Appellant, a surrender of the lease of the 15th of April, 1762, ought to be presumed in favour of the Appellant. Notwithstanding the verdicts which have been obtained on the several trials of the action at law against the Appellant, it is competent for a Court of equity, which is not bound by the decision of a Court of law, in a case of this nature, to admit such presumption. It is no objection, against the admissibility of such presumption, that the Respondent is a lunatic, and has been found, upon Inquisition, to have been so since the month of March, 1786, at which time Christopher Lopdell is alleged to have been still in possession under the lease; because such finding is not inconsistent with the supposition that the lunatic might have had lucid intervals, and that during one of such lucid intervals, such surrender might have been accepted; and there is evidence in the cause, of the lunatic having had at least one such lucid interval; and even if such evidence were wanting, or if the fact were negatived, yet, the acceptance of such surrender not being an act in the discretion of the Respondent, it is not necessary for the presumption of such surrender to suppose that it was made during such lucid interval.

There was gross neglect on the part of the several committees and receivers, who were from time to time appointed to manage the Respondent's estate,

and to collect the rents, in suffering the rent to be in arrear, and in not resorting to the land for payment, although it appears by the evidence that there was at all times, or at least generally, a sufficiency of stock on the premises, in case they had thought fit to distrain; and, in consequence of no steps having been taken in pursuance of the order of the 23d of July, 1811; and also in consequence of the order for vacating the recognizance, entered into by William Croker, and his sureties, having been collusively obtained upon the petition of the representatives of the sureties, the Appellant is precluded from any remedy which he might otherwise have had against the estates of the sureties. These facts when coupled with the circumstances of relationship between the several parties, and with other facts of the case, afford strong ground for presuming fraud and collusion on the part of those to whom such neglect is attributable; the Appellant has been rendered liable to a demand in respect of the rent so suffered to be in arrear, to which, but for such gross neglect, he never would have been liable; the demand made is, under such circumstances, wholly unconscionable, and one against which, upon every principle of justice, a Court of equity is bound to afford relief.

The presumption of an assignment from Christopher Lopdell to Richard Creagh, (which presumption appears to be necessary, in order to repel the contrary presumption of surrender,) has been directly negatived by the affidavit made by Richard Creagh, in the lunacy of the Respondent, which was given in evidence on the part of the Appellant: it appears by that affidavit, and by the evidence, that Richard Creagh entered into the possession of the lands, not as the assignee of Christopher Lopdell,

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or claiming or deriving under him, but as the agent and manager of the estate of the Respondent, who was his brother by the half-blood; and in the event of whose dying intestate, Richard Creagh, would be entitled, as one of the next of kin, to a distributive share of any monies to be recovered from the Appellant, on account of the rents of the lands; the entire rents of which lands, Richard Creagh had himself received already, and fraudulently converted to his own use, instead of paying or accounting for the same annually, to the different receivers in the matter of the lunacy, as the same became due; to which fraud or neglect of Richard Creagh in not paying or accounting for the same, it is owing, that the Appellant became liable at law to the payment.

For the Respondent:

Mr. Sugden ; Mr. Pepys.

The Appellant does not allege that Stephen Darcy, William Croker, or George O'Callaghan, ever received any money out of the lands; but on the contrary, the case made and relied on by the Appellant in his bill, is inconsistent with the fact of any such sum having been received. An account of what those several persons, or any of them, might, without wilful default, have received out of the lands, would be perfectly immaterial; for even if in fact it should appear that any such sum might have been received, the Appellant would not be entitled to credit for such sum, nor would his liability be in any way lessened in consequence. The accounts prayed by the bill could not be directed in the absence of George O'Callaghan, or of the representatives of Stephen Darcy and William Croker; who are not parties in the suit.

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Christopher Lopdell having by the indenture of the 15th of April, 1762, covenanted to pay the rent during the continuance of the term, he and his representatives were bound by the covenant during the term; and at all events, whether he and his representatives were so liable or not, and whether in fact the term did continue until the period to which the Respondent claimed the rent or not, were questions cognizable in a court of law, and have already been decided in favour of Respondent, by the proper tribunal. The Appellant has not established any facts sufficient to warrant a court of equity to interfere to protect the Appellant from his legal liability, and to deprive the Respondent of his legal right; for mere lapse of time, independent of any other circumstances, cannot create an equitable bar to a legal right, when the legislature has not thought fit to constitute it a legal bar; and in this case the Appellant has not proved any other circumstances, and has not shown that any collusion existed between the several persons charged therewith in his bill; and even if in fact any collusion did exist between them, it must have been for the purpose of defrauding the Respondent; and if a court of equity should now restrain the Respondent from enforcing his legal claim, it would in effect promote the object of that collusion, and lend its aid to the accomplishment of fraud.

If the Appellant has sustained any loss as Administrator, it has been occasioned by the neglect and want of good faith of Christopher Lopdell, who, when he transferred his interest in the lands to Richard Creagh, might have protected himself, by obtaining from Richard Creagh proper security for the performance of those covenants by which he was him-

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self bound, and whose peculiar duty it was, considering the unfortunate situation in which the Respondent then was, to take good care that any person whom he might substitute as tenant in his own stead, should faithfully discharge his duty as such. Christopher Lopdell and his representatives were at all times primarily liable to the Respondent, and those concerned for the Respondent were not bound, in the first instance, to resort to any other person.

The Appellant cannot derive any equity from the recognizance entered into by the sureties of William Croker having been vacated, inasmuch as the Appellant would not be entitled to have any part of the sum secured thereby, applied in discharge of the debt for which he is liable as such administrator, even if the whole amount of the recognizance should now be levied from the sureties, the same being only a security for what William Croker actually received out of the Respondent's estate; and William Croker never having received any sum out of the lands, or on account of the rent thereof, the Appellant could not in any event be entitled to have the recognizance enforced against the sureties for his benefit; for even if the recognizance should be deemed a security for such sums as William Croker might have received, yet inasmuch as Christopher Lopdell and his representatives were at all times liable to the Respondent for the rent of the premises, it was the duty of William Croker to have compelled the payment thereof by Christopher and his representatives; and although the sureties might be liable to the Respondent in consequence of William Croker's neglect, yet the Respondent might resort to those who were always liable to the payment of rent, and from whom William Croker ought to have received the

same ; and so far from Christopher Lopdell and his representatives having any right in such case to be reimbursed by those for whom William Croker ought to have received the rent, the sureties would in case of default have a claim in equity against the Appellant, but the Appellant could not in any event have any claim against the sureties.

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*The Lord Chancellor,** in the course of the argument observed, that the questions of limitation of time, and presumption of surrender of the lease, were peculiarly questions for the decision of a court of law : that the affidavit of Richard Creagh was evidence only that such an affidavit had been made, not of the facts contained in it ; that the receipts of Richard Creagh proposed to be introduced as evidence being mere abstracts of the original receipts copied from dictation, and not even compared with the originals, could not be admitted in evidence ; and that notice to produce the originals having been served upon a person not a party in the suit, was wholly inoperative, and could not be admitted as a ground to receive the secondary evidence of copies. The Lord Chancellor also observed, that some equity had been opened by the Appellant's counsel, but no case proved ; and thereupon the judgment was affirmed with 150*l.* costs.

* Lord Lyndhurst.

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IRELAND.

(COURT OF CHANCERY.)

WILLIAM HENRY ARCHER . . . *Appellant.*WILLIAM LITTLE *Respondent.*

By an Act of Parliament for the improvement of the city of Dublin, reciting that the cleansing of the streets before an Act passed in 1784, had been managed by the Corporation of Dublin, and the expense defrayed by them out of the tolls and customs of the city; and that since 1784, the Corporation had paid to certain intended Commissioners the sum of 2000*l.* yearly, towards the expenses of cleansing the streets, it is enacted that, from the passing of the Act, the Corporation shall pay to the Commissioners of Paving, &c. appointed by the Act 2000*l.* yearly, out of the revenue arising from the tolls and customs of the city.

The Corporation, according to the Act, paid the 2000*l.* annually until 1818, after which, the payment being in arrear, the Commissioners, by their Secretary, under the authority of the Act, in Easter Term, 1819, brought an action against the Treasurer of the Corporation to recover 2000*l.*, being one year's instalment. After appearance, the Corporation represented, that the tolls and customs were insufficient to pay any part of the 2000*l.*, and proposed that the action should be stayed without prejudice to other proceedings. To this proposal the Commissioners acceded, and the action was discontinued.

In 1821, the Commissioners brought another action to recover arrears, among which, by the fourth count in the declaration, 6000*l.* were claimed, as due on account of the arrear for three years' payment for cleansing the streets, to which the Defendants pleaded that during the three years in the count mentioned, no revenue had arisen to the Corporation out of the tolls and customs whereout the Corporation could have paid to the Commissioners, &c. In consequence of this plea, the Commissioners, in the name of their Secretary, filed a bill in Chancery against the Defendant in the action, stating the facts above-mentioned, and charging that the tolls were not deficient, and setting forth the particulars of various tolls and customs, claimed and received by the Corporation; that before and since 1784, the Corporation had let the tolls or some part of them upon leases at large rents; and

that since the year 1784, the Corporation had received in tolls every year, beyond the sum paid to the Commissioners, a surplus annually of 2000*l.* at the least. Upon these statements, with interrogatories founded upon them, the bill prayed, in aid of the action a discovery and account of the revenue arising from tolls and customs, and of the leases granted, and the rents received and paid upon the same.

To this bill the Defendant demurred:—1st, as to so much as sought a discovery and account of the surplus of revenue received by the Corporation in every year since 1784, beyond the sum paid to the Commissioners; the cause assigned was, that such surplus was not liable to the payment of the arrears of future years; the second demurrer was to so much of the bill as sought a discovery of the leases of tolls and customs granted by the Corporation since 1784, and not subsisting since 1818; the ground of this demurrer was, that, the arrears had been paid up to 1818, and that the surplus of tolls before 1818, could not be applicable to the payment of arrears accruing after 1818.

The Defendant also put in a long answer in which he admitted that the Corporation and their lessees both before and since the year 1784, had demanded and received tolls on various articles, and that payments had been and were made upon ships entering the harbour and ferries; but contended that such payments were not liable under the Act to the payment of the 2000*l.*; and he set forth accounts in schedules, of tolls and customs and payments made for ships and ferries since 1818; insisting that since that time there had been no surplus monies received upon tolls and customs after defraying the expence of collection.

Held (affirming the judgment of the Court below) that the demurrers should be overruled.

The reasons for the judgment on the appeal were: first, because the demurrers were overruled by the answer; and secondly, because even admitting that the surplus of former years was not applicable to the payment of arrears of future years, the discovery of the revenues actually received in such years might be material to furnish presumptive evidence upon the trial of the action.

THE Appellant was the Treasurer of the Corporation of the city of Dublin; the Respondent was Secretary to the Corporation called the Commissioners for paving, cleansing, and lighting the streets of the city of Dublin.

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By an Act of Parliament (47th George III.), entitled "An Act for the more effectual Improvement of the City of Dublin, and the Environs thereof," the Commissioners for paving, cleansing, and lighting the streets of the city of Dublin, were constituted a Corporation. The Act recited, that the Corporation of Dublin were, before the passing of an Act therein recited, (26th Geo. III.) liable to keep in repair certain parts of the pavements of the city, the annual expense of which was estimated to amount to 300*l.*, which sum was directed to be paid by them, as a compensation for the paving thereof. Upon this recital it is enacted, that the Corporation of Dublin should pay to the Treasurer of the Commissioners, the annual sum of 300*l.*, together with a further sum of 50*l.* in every year, for the pavement round St. Stephen's Green, amounting in the whole to the sum of 350*l. per annum*; and that in consideration of the payments so to be made, the Corporation of Dublin should be exonerated from all expenses of paving and repairing the pavements. The Act further reciting, that the Corporation were theretofore used to maintain several lamps at the Mansion-House, Tholsel, and Market-House, enacts that the Treasurer of the city should pay for such purposes to the Treasurer of the Commissioners, the annual sum of 20*l.* in every year; and that, in consideration of such payment, the Corporation should be exonerated from all expenses of lighting those lamps.

The Act further reciting, that the cleansing of the streets, and other places in the city of Dublin, before the passing of a certain Act, (23d and 24th Geo. III.,) was conducted under the direction of the Corporation, and the expenses thereof defrayed by them out of the revenue arising from the

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tolls and customs of the city; and that since the passing of the 23d and 24th *Geo.* III., the Corporation had paid to the Commissioners or Directors intended to manage the paving, lighting, and cleansing the city, the sum of 2000*l.* yearly, towards defraying the expenses of cleansing the streets; enacts, that the Corporation of Dublin shall, from the passing of the Act, pay, and continue to pay to the Commissioners, the annual sum of 2000*l.* out of the revenue of the city, arising from the tolls and customs of the city, by equal half-yearly payments to be made on the 25th day of March, and the 29th day of September in every year: and it is further enacted, that in case any body corporate should neglect or refuse to pay any rates to be assessed by virtue of the Act, the Commissioners, or their proper officers or officer, might recover the same by action, or other legal proceeding instituted against the Treasurer of such body corporate, in the name of the Secretary to the Commissioners.

The Corporation of Dublin, from time to time, and up to the year 1818, paid the annual sums of 350*l.*, 400*l.*, and 2000*l.*

On the 25th of March, 1819, an arrear being due to the Commissioners, they, in Easter Term, 1819, commenced an action in the King's Bench, in Ireland, in the name of the Respondent, as their Secretary, against the Appellant, as Treasurer to the Corporation, for the recovery of the arrear. The Appellant having entered his appearance to the action, it was alleged by the Corporation, that the annual sum of 2000*l.* was payable only out of the revenue of the city of Dublin, arising from the tolls and customs of the city, and that such revenue was unproductive, and insufficient to pay the whole or any

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part of the sum of 2000*l.*, for which the action had been brought: and thereupon a proposition was made by the Appellant on the part of the Corporation, that the Commissioners should accept of the arrear of 20*l.* and 350*l.*, without prejudice to any proceedings they should think fit to adopt for the recovery of the 2000*l.* The Commissioners, believing the representation as to the tolls and customs of the city being unproductive, to be true, acceded to the proposition; and received the two sums of 20*l.* and 350*l.*, leaving the sum of 2000*l.* still in arrear.

On the 25th day of March, 1821, further arrears became due, amounting to the sum of 4640*l.*, in addition to the 2000*l.*, and making altogether an arrear of 6640*l.*; and the Commissioners, in Easter Term, 1821, commenced another action. As to the arrear of 6000*l.* which was claimed by the fourth count of the declaration filed in the action, as the compensation payable under the Act for cleansing the streets, the Defendant pleaded, that he did not owe the same, or any part thereof; and, that during the three years in the fourth count mentioned, ending the 25th March, 1821, no revenue arose to the Corporation out of the tolls and customs of the city, whereout the Corporation could have paid to the Respondent, or to the Commissioners, the sum of 6000*l.*, and that the Corporation had not received out of the tolls and customs of the city the sum of 6000*l.*, or any part thereof.

In December, 1821, the Commissioners filed a bill in Chancery, stating the facts above set forth, and charged, that the Respondent could not go to trial in the suit at law without a discovery; that the tolls were not deficient, as alleged by the Corporation; and that, if they were so, such deficiency was

occasioned by the misconduct of the Corporation; that the Corporation had made illegal demands for tolls and customs; that they were in the receipt of various tolls and customs arising from the public markets, which were properly chargeable with the payment of the annual sum of 2000*l.*, that such markets in some cases had been let at considerable annual rents, particularly the markets in Hals-ton-Street, or the Little Green, and Mary's-Lane; that large tolls and customs were collected from the market at Smithfield and Kevin-Street, and at the Burgh-Quay, at Stoney-Batter, the Grand Canal Harbour, and Frances-Street, and particularly for weighage and cranage; that the Corporation used divers public cranes, which yielded considerable rents; that the Corporation received a customary payment for ships entering the port of Dublin; that there were divers ferries and a bridge over the Anna Liffey, for which they received certain payments; together with large sums for pontage, murage, passage, stallage, peckage, and weighage.

The bill further stated, that a market-house in Thomas-Street yielded large customary payments; that the Market-House being required for the use of the public, the Commissioners for making convenient streets in the city of Dublin, purchased of the Corporation the Market-House, and all their interest arising therefrom, and the tolls and customs there collected, at the price of 4000*l.*, which sum had been received by the Appellant, as Treasurer of the Corporation, since the 25th March, 1819, and applied to the use of the Corporation, and that no part thereof was paid to the Commissioners, in discharge of their demand, upon the foot of the annual sum of 2000*l.*, or any part thereof; that

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the sum of 4000 *l.* was awarded by a jury, and that some part thereof was so awarded on account of the loss which the Corporation would sustain in the tolls and customs of the Market-House; in evidence of which loss, proof was given before the jury, of what the Corporation had theretofore made by the Market-House, and the tolls and customs arising therefrom, and what they were thereafter likely to make in respect thereof; that the materials of the Market-House, and the scite thereof, were comparatively of little value, but that in consequence of the loss which would arise to the Corporation by their being thus deprived of the market, and of certain valuable tolls and customs, and also of the rent or sums paid for stallage and stands within or about the same, the sum of 4000 *l.* was awarded by the jury.

The bill farther stated, that in, or shortly previous to, the year 1784, the Corporation demised the tolls and customs of the city at the yearly rent of 4050*l.*, since which time the Corporation had made various other demises of the tolls and customs for considerable rents, and that the whole of the revenue arising from tolls and customs, was vested in the Corporation, for the purpose of paving and cleansing the streets of Dublin, as appeared from the charters of the Corporation, and also from the Report of a Committee of the House of Commons, made in or about the year 1784; that since the year 1784, the Corporation had never in any one year, paid to the Commissioners more than the sum payable by the Act of the 47th *Geo. III.*, (that is to say), the sum of 2370*l.* in the whole; and that the Corporation had received in every year since the year 1784, over and above the sum paid to the Commis-

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sioners, an annual sum of 2000*l.*, at the least,* out of which, if there was at the time of filing the bill a deficiency in the tolls and customs received within the last three years, the Commissioners were entitled to satisfaction of the arrear due, or to so much thereof as the annual receipts of the tolls and customs for the said three years should appear to be inadequate to discharge.

The bill charged that the toll receivable by the Corporation was toll thorough; and that the consideration given by them for the same prior to the passing of the Act of the 23d and 24th *Geo. III.*, was by their paving and repairing certain parts of the city, which had since been performed by the Commissioners.

The Bill prayed, that the Appellant, as Treasurer of the Corporation might, in one or more schedule or schedules to be annexed to his answer, set forth a full, true and perfect account, of all and every the revenue of the city of Dublin, arising from tolls and customs, or customary payments, including petty customs of every description, and pontage, murage, passage, stallage, package, weighage, and cranage, and including the tolls, customs, and petty customs relating to, and payable out of, the several public markets and cranes, ferries and bridges, in the city of Dublin, distinguishing which of the several tolls, customs, petty customs, and customary payments, had been available since the 25th day of March, 1818; and might also, in such schedule or

* Upon this allegation of the bill an interrogatory must have been framed, which is the subject of the first demurrer. The interrogatories are not set forth in the printed cases: nor is the fourth Count of the declaration on which the case turns. The Lord Chancellor complained of the omission as too common in Irish cases. See post p. 296.

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schedules, set forth a full and accurate account of the several sums of money, which the several tolls and customs, petty customs, and customary payments respectively, had yielded quarterly since the 25th of March, 1818, and down to the time of filing his answer; and of the several and respective sum and sums of money which the Corporation, or their Treasurer, or other officers, had received thereout respectively since the 25th day of March, 1818; and that the Appellant should, in such schedule, distinguish how much of the tolls and customs, petty customs, and customary payments, had been received by the different officers, servants, farmers, or lessees of the Corporation, and how much had been paid to the Treasurer of the Corporation, and the difference between the sums received and the sums paid to such Treasurer; and that the Appellant should also set forth a full and accurate account (stating the date, term, tenants' name, and the considerations paid), of the several leases (if any) made by the Corporation of the tolls and customs, customary payments, or petty customs aforesaid, or of the markets, cranes, or other places, wherein the same are collected by virtue of such lease or leases, and of the rents reserved upon each lease, and the payments made on account of such since the 25th day of March, 1818; and that the Appellant, before he answered the bill, should inspect the books of account of the Corporation, which could give him any information upon the subject, so that he might be enabled to make full answer to the Respondent's bill; and also that the Appellant should state whether he had so done; and should also consult any officer or servant of the Corporation, with regard to such matters and things,

for the purpose aforesaid; and that he should state whether he had so done.

The Appellant put in demurrers to part of the bill, and a very long answer to the remainder.

The demurrers filed by the Appellant, are as follows :

“ As to so much of the said bill as seeks a disco-
 “ very whether the Lord Mayor, sheriffs, commons,
 “ and citizens of the city of Dublin, have or have not
 “ in each and every year since the year 1784, and prior
 “ to the year commencing on the 26th day of March,
 “ 1818, received an annual sum of 2000*l.* at the
 “ least, or any other, and what annual sum, over and
 “ above the sum paid to the Directors or Commis-
 “ sioners appointed by Act of Parliament for paving,
 “ cleansing and lighting the streets of Dublin; and
 “ what sum the said Corporation of the Lord Mayor,
 “ sheriffs, commons, and citizens of the city of
 “ Dublin received in each and every year, particu-
 “ larly from the said year 1784, down to the end of the
 “ year expiring on the 25th day of March, 1818, out
 “ of any tolls and customs of the said city, over and
 “ above the annual sum paid to the said Directors or
 “ Commissioners; and how much such surplus sums
 “ in the whole amount to: and as to so much of the
 “ said bill as calls upon this Defendant to set forth
 “ in a schedule or schedules, or otherwise, any ac-
 “ count of any revenue of any description payable to
 “ or received by, or arising to the said Corporation
 “ of the Lord Mayor, sheriffs, commons, and citizens
 “ of the city of Dublin, in any year previously to the
 “ year commencing on the 26th day of March, 1818,
 “ —this Defendant doth demur thereto, and for
 “ cause of demurrer, this Defendant shows, that it

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" appears and is stated in and by the complainant's
 " bill, that all sums of money due or payable by or
 " from the said Corporation of the Lord Mayor,
 " sheriffs, commons, and citizens of the city of
 " Dublin, to the said Commissioners for paving,
 " cleansing and lighting the streets of Dublin, up to
 " and for the said 25th day of March, 1818, in re-
 " spect of the annual sum of 2000*l.* in the bill men-
 " tioned, have been fully paid, satisfied and dis-
 " charged by the said Corporation to the said Com-
 " missioners; and the Defendant humbly submits and
 " insists, that no sum or sums of money received by
 " the said Corporation as part of the revenue of the
 " said city, arising out of the tolls or customs of the
 " said city or otherwise howsoever, upon, or at any
 " time prior to the said 25th day of March, 1818, is,
 " or ever was, or could be, by law subject or liable to
 " the payment of any alleged arrear of the said
 " annual sum of 2000*l.*, accrued, or alleged to have
 " accrued or become payable or due to the said
 " Commissioners by the said Corporation, subse-
 " quently to the said 25th day of March, 1818, and
 " therefore that the complainant is not, nor are the
 " said Commissioners, entitled to any discovery
 " with respect to any revenue or receipt whatsoever,
 " of the said Corporation, during any year prior to
 " the year commencing on the 26th day of March,
 " 1818, either from this Defendant or the Corpora-
 " tion of the Lord Mayor, sheriffs, commons, and
 " citizens of the city of Dublin. Wherefore, &c.

" And as to so much of the bill as seeks a disco-
 " very of any lease or leases, demise or demises, of
 " the several tolls and customs in the bill mentioned,
 " or any of them, or any part thereof, or any other

" lease or leases executed by the said Lord Mayor,
 " sheriffs commons, and citizens of the city of
 " Dublin, and not subsisting and in force subse-
 " quent to the 25th day of March, 1818, this De-
 " fendant doth also demur thereto, and for causes
 " of demurrer this Defendant shows, that it appears,
 " and is stated in and by the complainant's bill, that
 " all sums of money due or payable by, or from the
 " said Corporation of the Lord Mayor, sheriffs, com-
 " mons, and citizens of the city of Dublin, to the
 " said Commissioners for paving, cleansing, and
 " lighting the streets of Dublin, up to and for the
 " said 25th day of March, 1818, in respect of the
 " annual sum of 2000*l.* in the bill mentioned, have
 " been fully paid, satisfied and discharged by the
 " said Corporation to the said Commissioners: and
 " the Defendant humbly submits and insists, that no
 " sum or sums of money received by the said Corpo-
 " ration as part of the revenue of the said city,
 " arising out of the tolls and customs of the said
 " city or otherwise howsoever, during any year prior
 " to the year commencing on the 26th day of March,
 " 1818, is, or ever was, or could be, by law subject
 " or liable to the payment of any alleged arrear
 " of the said annual sum of 2000*l.* accrued, or al-
 " leged to have accrued or become payable to the
 " said Commissioners by the said Corporation subse-
 " quently to the said 25th day of March, 1818, and
 " therefore that the complainant is not, nor are the
 " said Commissioners, entitled to any discovery with
 " respect to any such lease or leases, demise or de-
 " mises, as herein before last-mentioned, either from
 " this Defendant or the said Corporation of the Lord
 " Mayor, sheriffs, commons, and citizens of the city
 " of Dublin. Wherefore, &c:

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The Appellant by his answer, admitting the Act of Parliament, (47th *Geo.* III.) and that the Respondent was secretary to the Commissioners ; and the payment made by the Corporation to the Commissioners up to the 25th March, 1818, in consequence of a judgment obtained by the Commissioners, and also the arrear due on the 25th March, 1819; submitted that no sum was then due to the Corporation on account of the annual sum of 2000*l.* inasmuch as the funds liable thereto had been unproductive.

The answer farther admitting the sums of 350*l.* and 20*l.* to be due, and the action commenced in Easter Term, 1819, and proceedings therein, stated the proposal made on the part of the Corporation, and that the proposal was agreed to on the part of the Commissioners, in consequence of their being satisfied of the truth of the Appellant's representations, and, that in order to satisfy the Commissioners upon the point, an account of the revenue was furnished to the Commissioners.

Admitting also the action commenced by the Respondent in Easter Term then last, and that it was then depending and the pleas pleaded by him to the action, the Appellant by his answer denied that the Corporation had at any time subsequent to the 25th of March, 1818, any funds, whereout to discharge the arrears of the annual payment of 2000*l.*, inasmuch as the expenses of collecting the tolls and customs had exceeded the receipts ; he denied that the Corporation alleged that the tolls and customs had not been at all paid since the 25th March, 1818, but admitted that it had been alleged that they had not been sufficient to defray the costs of collecting them ; he denied that

the deficiency was occasioned by the misconduct of the Corporation, and said, that if any illegal practices existed, they were wholly unauthorized by the Corporation; that the tolls and customs collected since the 25th March, 1818, were the same as existed at the time of the passing of the Act of the 47th *Geo.* III.; that in 1818 there was a general disposition in Ireland to resist the payment of tolls and customs; and that since the 25th March, 1818, persons who previously paid tolls and customs without opposition, refused to pay them: he submitted, that if the demand of tolls and customs were legal since the 25th March, 1818, they must have been so at the passing of the Act of the 47th *Geo.* III., but insisted that the tolls and customs were illegal. He admitted that, in consequence of the refusal to pay tolls and customs, the Corporation had been compelled to commence legal proceedings to enforce payment of them; but did not believe that, if the Corporation had acted as in the bill stated, the payment of the tolls would not have been evaded. He insisted that the tolls and customs received at the time of passing the Act of the 26th *Geo.* III., were reasonable, and would not have been objected to, except under the circumstances. He denied that such tolls had been, prior to the passing of the last mentioned Act, paid only after the sale of the commodity.

The Appellant by his answer farther admitted, that since the passing of the Act (26 *Geo.* III.) as well as from time immemorial theretofore, the Corporation or their lessees demanded and received tolls and customs on various articles, matters and things passing into the city, and before the same were sold; and which articles, with the rates of toll respectively charged thereon, he set forth in the first schedule to the answer annexed;

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but whether or not such demands were contrary to law, or whether any immemorial usage would be necessary in order to warrant such demands, the Appellant could not state; but he believed that the Corporation rested their claim to the tolls and customs not merely upon their charters, but upon immemorial custom and prescriptive right. The Appellant also admitted, that the annual sum of 2000*l.* was directed to be paid to the Commissioners by the Act (47th *Geo.* III.) out of the revenue of the city, arising out of the tolls and customs of the city, payable in respect of corn and other tollable articles passing into or out of the city, as specified in the first schedule to the answer annexed: but out of no other revenue. The Appellant submitted that such revenue means the surplus, if any, arising to the city out of the receipts of the tolls and customs in the Act mentioned, after defraying the expences incurred in the collection thereof; and that such last-mentioned revenue was the only fund intended by the Act (47th *Geo.* III.) to be charged with the payment of the annual sum of 2000*l.*: he therefore denied that the Corporation then was, or at any period since the 25th of March, 1818, had been, in the enjoyment of any tolls or customs contemplated by the Act (47th *Geo.* III.) so as to form the revenue of the city justly chargeable with the payment of the annual sum of 2000*l.* to the Commissioners.

The Appellant by his answer farther admitted, that the Corporation had not during the last-mentioned period, accounted for or paid over to the Commissioners, any sum out of the tolls and customs charged with the annual sum of 2000*l.*, such receipts not having been in any one year during

that time equal to the expences of collecting such tolls: he admitted, that there were in the city divers public markets, wherein, or in some of which, tolls and customs were collected, but of what description in particular, he did not know; for he stated that none of such markets were, to his knowledge or belief, held by the Corporation, though the Lord Mayor of the city had the superintendence thereof, by virtue of his office of clerk of all markets in the city; but whether or not tolls or customs, or any payments therein made, did in point of law belong to the Corporation, or whether or not the Corporation at any time demised the markets, he could not set forth as to his belief or otherwise; but he believed that the Corporation had never received any tolls or customs thereout.

The Appellant farther stated by his answer, that he did not believe that there were in Halston-street, or the Little Green in the neighbourhood thereof, or in Mary's-lane, in the city of Dublin, different public markets, though he admitted that there had been for many years, and that there was then, a public market held at the Little Green, in the city of Dublin, and extending to Halston-street, and Little Mary-street, in which commodities were sold; but that he could not set forth whether the same did or not belong to the Corporation; but he stated that the market had never been held by the Corporation, but by one William Clarke, and that payments were therein made in the nature, as the Appellant supposed, of tolls and customs; but what such tolls and customs were, or what they included, he could not set forth as to his belief or otherwise, excepting that he did not believe that such tolls and customs were of the annual value of 2000*l.*, or any such

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value, or that they produced, or for the three years in the bill mentioned had produced, that or any such sum, nor what sum in particular; but he did not believe that any sum had been received therefrom, to the use of the Corporation, or that the market, or any profits thereof, or in respect of the soil thereof, had ever been demised or let by the Corporation.

It was denied that any markets whatever in the city of Dublin had been demised by the Corporation, or any fines or annual rents paid in respect thereof.

In was admitted that there were, at the places mentioned in the bill, public markets; but contended that those markets did not belong, or produce any emolument, customs or tolls to the Corporation, nor did the same ever compose any part of its revenues.

The Appellant by his answer farther said he believed that there were in the city divers public cranes; but that none of such cranes, then or at any time since the 25th day of March, 1818, yielded any fees or emoluments to the Corporation, nor did any such fees or emoluments ever form any part of the revenue of the city, arising from tolls and customs; nor did such public cranes belong to, nor were they ever demised by the Corporation, nor ever yielded to the Corporation any rents; for that the only crane with which the Corporation had any connexion by way of profit, was a crane situate in Bridge Fort-Street, the soil or ground and warehouses whereof had been demised by the Corporation at the rent of 100 guineas per annum, which rent was payable only in respect of the ground whereon the crane stood, and not as an equivalent for the profits arising from weighing thereat, for that such profits had never belonged to the Corporation.

It was admitted, that for all ships entering the port of Dublin a customary payment was made to the Corporation ; but contended, that such customary payment was not any part of the revenue arising from tolls and customs contemplated by the Act (47th *Geo.* III.), and thereby rendered liable to the payment of the annual sum of 2000*l.* It was admitted, that such last-mentioned customary payments had been received by the Corporation since the 25th of March, 1818, and had yielded to them some, but not a considerable income, which the Corporation had applied to their own use, and the same had not been paid over by them to the Respondent or the Commissioners.

The Appellant, in the second schedule to his answer, set forth the amount of the revenue arising from the customary payment on ships since the 25th of March, 1818; he admitted, that there were divers ferries in the city, over the river Anna Liffey, the rent of which belonged to the Corporation; but he submitted, that those rents formed no part of the revenue arising from the tolls and customs of the city, subjected by the Act (47th *Geo.* III.) to the payment of the annual sum of 2000*l.*, though he admitted that the Corporation had been in the receipt of the rent of the ferries since the 25th day of March, 1819, and that the rent was paid to the Corporation by the lessee of the ferries, as an equivalent for such profits as in the answer stated; but that no separate rent was paid to the Corporation in respect of the bridge.

In the same schedule he also set forth the sums received by the Corporation in respect of the rent of the ferries, including the bridge, since the 25th March, 1818; and he admitted that the

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same had not been applied in payment of the annual sum, but to the use of the Corporation; but the Appellant denied that any fine had been received by the Corporation for any demise of the ferries or bridge, since the 25th March, 1818, or that the Corporation received any sum or sums of money whatever for tolls, or customary payments for pontage, murage, or passage, though he could not set forth whether the Corporation were or not entitled to any such last-mentioned tolls or customs; but he believed that the Corporation had not received any such payments since the 25th day of March, 1818, nor were the Corporation, as the Appellant believed, entitled to any weighage, stallage, or package, independently of the several tolls and customs in the bill and answer before enumerated. He admitted, that no sum derived from any of the several last-mentioned sources was ever paid by the Corporation to the Commissioners for paving, cleaning, and lighting the streets of Dublin.

It was further admitted, that there was in Thomas-street, in the city, a public market-house belonging to, and built by, the Corporation; that the ground upon which the same stood was the property of the Corporation; that the market-house was used for certain purposes in the answer stated; and that persons paid, for standing under the same, certain weekly sums to the Corporation, but not as tolls or customs, nor were the Corporation entitled to, nor did they receive, any tolls or customs for grain sold at the market-house since the 25th of March, 1818. The Appellant also admitted, that the market-house, together with the scite thereof, was sold for such reasons, and to such persons, and for such sum, as

in the bill mentioned; but he denied that any part of the interest of the Corporation in any tolls or customs there collected was included in the sale.

It was admitted, that no part of the purchase-money had been paid by him or the Corporation to the Commissioners, in discharge of the annual sum of 2000*l.* or otherwise, the purchase-money forming no part of the revenue of the city, which was liable to the payment of the annual sum of 2000*l.* or any part thereof. The Appellant also admitted, that the purchase-money was ascertained in the manner in the bill mentioned; but he denied that any part thereof was awarded in respect of any loss which the Corporation would sustain in respect of any tolls or customs arising from the market-house, or that evidence of such loss adduced before the jury, determined the amount of the purchase-money; but he said that the evidence was confined to those subjects only in the answer particularly mentioned.

The Appellant denied, that the materials of the market-house, or the scite thereof, was only of such value as in the bill mentioned, or that any such facts were given in evidence before the jury, the purchase-money being, as the Appellant believed, the fair value for the scite and the materials of the market-house, and of the profits which the Corporation derived from the storage of corn in the lofts thereof, and for weekly payments made to the Corporation, and also of the future profit which might accrue to the Corporation, by applying the market-house in future to other uses.

The Appellant by his answer further stated, that the only demise made by the Corporation, of the tolls and customs mentioned in the Act (47th *Geo.*

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III.), since the 25th of March, 1818, was a demise of the tolls and customs to Alderman John Claudius Beresford, at such rent, for such term, and made with such view as in the answer mentioned; but that nothing had been received in respect of the demise since the 25th of March, 1818. The Appellant denied that it appeared from any of the charters of the Corporation or otherwise, that the whole of the revenue of the Corporation arising from tolls and customs was vested in the Corporation, for the purpose of paving or cleansing the streets of the city, though the Appellant had been informed and believed that it was so stated in a Report of a Committee of the House of Commons.

The Appellant further stated his belief, that since the year 1784, the Corporation had never in any year paid more to the Commissioners for paving, cleansing, and lighting the streets of Dublin, than the gross amount of the several annual sums payable by the Act (47th *Geo. III.*), that is to say, the sum of 2370*l.* in the whole. The Appellant said that he could not state whether the toll to which the Corporation was entitled, and which was by the last-mentioned Act subjected to the payment of the annual sum of 2000*l.*, was or not toll thorough; but admitted, that since the passing of the Act 23d and 24th *Geo. III.* the duty of paving and repairing had been performed by the Commissioners.

The Appellant submitted to the opinion of the Court, whether the Commissioners were or not entitled in the first instance, before any application of any part of the revenue of the city arising from the tolls and customs in the Act of the 47th *Geo. III.* mentioned, should be made, to full or any payment or satisfaction of their demands; insisting that the only

revenue arising from the tolls and customs, applicable to the payment of their demand, was the surplus arising from the receipts of the tolls and customs, after defraying the expenses of collecting; and that no such surplus had been received by the Corporation since the 25th of March, 1818.

The Appellant, in the third schedule to his answer, set forth all sums of money received by him or by the Corporation, from the 25th of March, 1818, to the filing of the answer, for or on account of the tolls and customs, in and by the Act (47th *Geo. III.*) mentioned, and made liable to the payment of the annual sum of 2000*l.*, together with the expenses of collecting the same, and the names of the persons by, and through whom such payments were made; but said that he could not state whether there was any difference between such sums as were actually received by the several persons appointed to collect the tolls and customs, and the sums which they accounted for. In the second schedule to his answer annexed, he set forth an account of the sums received by him or the Corporation since the 25th of March, 1818, out of the profits of ferries, and also of all payments made by ships in the bill mentioned, and the several sums, and the manner in which such payments had been made.

The two demurrers were argued before the Master of the Rolls, on the 26th and 29th days of June, 1822, and the 4th, 6th, and 18th days of July following; and on the 18th day of July it was ordered, that the first demurrer should be overruled, with liberty to the Appellant to make such application as he should be advised, for the purpose of taking the demurrer off the file, and to demur

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and answer again. The second demurrer was allowed, with liberty to the Respondent to amend his bill, as he should be advised; and it was ordered, that each party should pay his own costs.

The Respondent, on the 16th of December, 1822, presented his petition to the Lord Chancellor of Ireland, praying that the two demurrers might be set down for re-argument before him; which being ordered, the two demurrers were re-argued on the 6th, 15th, 17th, and 18th days of February, 1823; and by order, on the 18th of February, both the demurrers were over-ruled.

From this order the appeal was made.

For the Appellants, *Mr. Sugden* and *Mr. Pepys*.

The two sums of 350*l.* and 20*l.* are made payable generally out of the revenues of the Corporation, and not yearly out of the tolls and customs, as in the provision respecting the 2000*l.* That one of the demurrers should be good and the other bad, as decided by the Master of the Rolls, is impossible, from the nature of the case. The bill admits that all arrears to 1818 had been paid, yet demands an account from 1784. The reasons of the Respondents resolve themselves into two classes. The main proposition is, that if the income of the Corporation is insufficient at any period to pay the allowance, it is payable out of the surplus income of former periods. This is a proposition of general application, relating to all such charges upon a particular fund. This case does not depend upon general principles, but upon the construction of an Act of Parliament. The Act recites the duties to be performed, and gives, as an equivalent, a certain sum yearly out of the tolls and customs of the city.

the discovery and account as to the tolls and customs received since 1818, is not within the scope of the demurrer. If the bill does not show a right to discovery, the demurrer is good: as, if it appears on the face of the bill that the action at law is untenable, the Commissioners having no right to payment out of the tolls received before 1818, how can they be entitled to discovery? * The discovery sought in this case will be useless at law. Yet this is one great argument for the right of discovery. To induce a jury to presume the amount of income in 1818, from proof of the amount in 1784, would be tempting them to rush to an erroneous conclusion; and if this is a proper ground to ask for a discovery, it should have been stated in the bill.

As to the objection, that it is a speaking demurrer, it alleges no fact which is not to be found in the bill, and uses no argument arising out of extraneous facts. The reasons arising out of the facts stated in the bill are always set forth, as appears by the form of demurrers.

The argument, that the demurrer is over-ruled by the answer, is untenable. The demurrer extends only to one interrogatory: that which relates to the recovery of tolls before 1818. The answer gives no discovery as to tolls since 1818.

For the Respondents, The Attorney General, and the Solicitor General.

The discovery sought is material and relevant in support of the Respondent's case at law; and, even that were matter of doubt, the discovery would be enforced in equity, leaving the legal question to be determined by the court of law.

* *Redd. Tr.* p. 152. 3 *Ves.* 494. 13 *Ves.* 240.

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Upon the true construction of the Act of the 47th *Geo.* III. c. 109. §. 51., and the Irish Act of the 23d and 24th *Geo.* III. therein recited, it is manifest that the revenue arising from tolls prior to 1818, over and above the annual sum of 2000*l.* made payable to the Commissioners for paving, if discovered, would be properly applicable to make good the deficiency in that annual sum subsequently to the year 1818, particularly as that deficiency has been occasioned by the misconduct and improper management of the Corporation of the city of Dublin.

Taking into consideration the original liability of the Corporation of the city of Dublin, as trustees for the public, to apply the whole of the revenue arising from tolls and customs in cleansing the streets of Dublin, as recited in the Act of the 47th *Geo.* III., and the Irish Act of the 23d and 24th *Geo.* III., it is at least a doubtful and arguable question, whether such surplus revenue received prior to 1818, is not applicable to subsequent deficiencies, caused by the mismanagement of the Corporation of the city of Dublin; and under such circumstances a Court of Equity should not stop the inquiry *in limine*, but should leave such question, involving the consideration of questions of law arising upon these acts of Parliament, to the consideration of the Court of Law where it originated, and where other questions of construction upon the same acts are depending between the parties in the same action.

Even though the surplus revenue, prior to 1818, were not applicable to make good subsequent deficiencies, still the discovery of the annual receipt of the sum of 4000*l.* by the Corporation of the city of Dublin, down to and for the year 1818, would be

evidence to go to a jury, to show *primâ facie* the receipt of a like revenue subsequently to the year 1818, which would be clearly applicable to the payment of the Respondent's demand.

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The discovery of any lease or demise of tolls and customs made by the Corporation of the city of Dublin prior to 1818, though the same might expire in that year, would be evidence *primâ facie* before a jury, to charge the Corporation of the city of Dublin with the receipt of tolls and customs, to the extent, in value, of the rent reserved in such lease or demise; and this, though the revenue prior to 1818 were not applicable to subsequent arrears.

The demurrers are argumentative, and do not sufficiently distinguish the particular parts of the bill demurred to; so that the Court must look over the whole bill to ascertain the parts in question.

The Appellant, by answering to certain facts or parts of the bill purporting to be covered by his demurrers, overrules the demurrers.

In the course of the argument, the Lord Chancellor made the following observations :

It is contended that the answer overrules the demurrer,—in what part has not yet been pointed out. Independently of that objection, is it contended that the action is maintainable even without proof of the alleged misconduct of the Corporation as to the management of the tolls and customs? Can they go to this extent? The Act creating the right passed in 1807, the bill seeks a discovery from 1784. If this can be maintained, might they not ask for a discovery in 1907? It is on this view of the case

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that I desire to know on what ground the Master of the Rolls gave leave to both parties to amend?

The Defendants do not demur to the discovery as to matters between 1818, and the filing of the bill.

As to the argument urged from the analogy of mortgages, annuitants, or grantees of a rent-charge, it is a misapprehension. Such incumbrancers could have no discovery as to by-gone rents and profits. The ordinary security is, first to distrain, then to enter, then a term; but as to by-gone rents, not a shilling could be recovered.

If the bill had asked what is the amount of the revenue actually in the hands of the Corporation, it might have been difficult to avoid answering; but to ask for discovery from such a remote time is a different thing. To seek a disclosure of all the affairs of the Corporation from 1784, is one thing; the question, what have you in your hands to pay the arrears of the 2000*l. per annum*, is another.

Perhaps the Master of the Rolls, in giving leave to amend, had a view to this distinction. If the Plaintiff is entitled to payment out of any revenues arising before 1818, it might be desirable to give leave to amend.

It is hard upon the judges of the Courts below, and in the Court of Appeal, that cases should be decided without knowing the reasons upon which the judgments are founded.*

As the judges in the Court below have not agreed in their opinions as to this case, it is a respect due to their judgments, that the House should take time

* The Lord Chancellor also observed, that, in Irish cases particularly, it was desirable, that accurate copies of the pleadings should be printed. See ante p. 279.

to consider the question, and to obtain, if possible, the reasons of their judgment.

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The Earl of Eldon,* after having stated the subject-matter of the appeal, the clauses of the Act of Parliament out of which the question arose, the facts, the pleadings, and proceedings in the case, continued thus:

The demurrers came on to be heard, first, before the Master of the Rolls in Ireland, who pronounced an order which was afterwards made the subject of appeal to the Lord Chancellor of Ireland, who, by his decretal order, overruled both demurrers, differing in opinion from the Master of the Rolls. When the appeal was heard in this House, measures were taken for the purpose of obtaining information, and reconciling the different opinions which had so been expressed: but more than one inquiry have not enabled me to state to your Lordships upon what grounds either the one or the other proceeded. The question now before you is, whether the judgment of the Lord Chancellor of Ireland, overruling these demurrers, is right or wrong? If you look at the reasons which are stated on the part of the Appellants, contending that the judgment is wrong, you will perceive, that all of them apply to this sort of representation, namely, that 2000*l.* a year have been fully paid and satisfied, down to the 26th day of March, 1818: that it does not signify what was the state of the revenues previous to the 26th March, 1818, and that according to the true construction of the Act of Parliament, the Corporation

* The case having been heard by Lord Eldon while he was Lord Chancellor, the judgment was delivered by him after he had retired from the office.

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is obliged *de anno in annum*, to expend the whole of their revenues, paying 2000*l.* to the Commissioners. Whether or not that is the true construction of the Act of Parliament, I desire it may be understood that I do not presume to state my opinion: because, I do not think that is a question which it is necessary to decide; and not being necessary, it appears to me that it would be improper to decide it. The true question is, whether regard being had to all that is stated in the answer, and to the fact, that this is a bill called a discovery bill, these demurrers ought to be overruled.

Upon an attentive perusal of the matter of the answer which is part of the record, in the first place, I have formed an opinion (in which I am confirmed by a very attentive consideration given to this case by a noble and learned Lord*) that, as a demurrer cannot be good in part and bad in part, which a plea may be, there is enough in this answer to overrule the demurrer: and I am farther of opinion, that, supposing (for the present, and desiring not to prejudice the question by the supposition,) that the Corporation are as right as probably they may turn out to be, in contending, that having satisfied the annual payment to these Commissioners up to a given time, all the rest of the revenue belongs to them, and that they are not bound to apply a surplus of revenue in one year to a deficiency of revenue in another year; still I am of opinion that the persons filing this bill as a bill of discovery have a right to know, what they desire to be discovered, how the account actually stands: because the state of the revenue antecedent to that period, may afford very considerable evidence with respect to many of

* Lord Redesdale.

the questions which arise out of this record; considerable evidence upon the trial of the issue which is joined at law.

Upon these grounds it is, that I offer my humble, but very confident opinion, that the Lord Chancellor of Ireland has rightly decided the case; and therefore, upon the motion, which is according to your forms the usual motion to be made, that this order should be reversed, my advice is to say, "Not Content" to that motion, for the purpose of affirming the judgment.

Judgment affirmed.

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(COURT OF EXCHEQUER.)

JOHN GLEGG, EGERTON LEIGH, JAMES
BAYLEY, THOMAS PARKER, JOSEPH } *Appellants.*
NIXON, and THOMAS WHYMAN, - - - }

RICHARD LEGH, - - - - - *Respondent.*

JANE GLEGG and others, (personal re- } *Appellants.*
presentatives of JOHN GLEGG,) &c. }

T. R. W. FRANCE and THOMAS - - } *Respondents.*
MAWDSLEY, (Executors of - - - }
RICHARD LEGH,) - - - - - }

In a suit for tithes by an impropriate rector against occupiers, where the Plaintiff by the answer is put to the proof of his title, it is sufficient, 1. As to personal ownership, to prove that he is the beneficial owner of the tithes subject to terms vesting the legal estate in trustees, and creating charges on the rectory, but which charges being annual are satisfied up to the date of the suit. 2. As to general title, it is sufficient to prove, a recent perception of tithes, with occasional payment of composition and leases of the tithes taken by the occupiers.

THE Respondent Richard Legh claimed to be entitled as tenant for life under the will of Charles Legh, to the impropriate rectory of Prestbury in the county of Chester, consisting of various townships or hamlets; and as such impropriator to receive from the occupiers of the several farms and lands lying within certain townships in the rectory, all manner of great tithes, and particularly the tithes of hay in kind.

The Appellants in the original appeal, respectively held farms and lands lying within the townships specified, and within the rectory.

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The Respondent Richard Legh, in Hilary Term, 1817, filed a bill in the Exchequer against the Appellants in the original appeal, stating his title as rector; and that the Appellants had taken tithes of hay, clover, and other grasses, and had refused to pay or account for the same, and praying an account of the tithes during the year 1816, and payment, waiving penalties.

The Appellants put in separate answers to the bill, and thereby severally admitted themselves to be occupiers, and to have mown and carried away hay; but stated that the Respondent had never received tithe of hay, or any satisfaction for such tithe; and claimed to be exempted by a modus, and without specifically answering the allegation in the bill, that the Respondent was seised of or entitled to the rectory. The defendants severally stated, that they did not know of their own knowledge, but believed, that the Respondent was not, at the time stated in the bill, seised or entitled for his life of or to the legal estate or interest in the rectory, and therefore, as to that fact, left the Respondent to such proof as he should be able to make.

The Appellant Thomas Whyman, in 1818, filed a cross bill against the Respondent Richard Legh, for the purpose of proving that he had no title to the rectory.

To this bill the Respondent put in two answers.

The cause was heard in June, 1820, when the Respondent read passages from the answers of the several Defendants, admitting their having severally occupied farms within the rectory, and having severally taken hay from their respective farms, and having,

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in 1816, severally paid a composition for tithes to the Respondent. The Respondent also proved payment of tithes to him as impropiator, or some person for his use.

There was also proof that leases of the tithes had been taken by the Appellants, as occupiers of land within the parish.

The Appellants, to make out that the Respondent had not such an interest in the rectory as entitled him to sue for the tithes, read from the answers of the Respondent to the cross bill, filed by the Appellant Thomas Whyman, passages admitting the existence of certain terms of years in the rectory, and that the same were outstanding in certain trustees; but in the passages admitting the existence of such terms, and from other passages in the answers, it appeared, that the terms were created and subsisting merely as collateral securities for the payment of certain annual sums, the whole of which, so far as the same were payable, had been paid to the time of the filing the answer, and that the Respondent was in the uninterrupted possession of the rectory and receipt of the tithes, and that none of the trustees of such terms had ever interfered with the Respondents receiving the tithes of the rectory.

The Defendants endeavoured to prove the modus laid in their respective answers, but failed in such proof.

A decree, bearing date the 8th day of July, 1820, was thereupon made in favour of the Respondent, and the Appellants were decreed to account in the usual manner for the tithe of hay taken by them within the rectory.

From this decree the appeal was presented.

After the petition of appeal had been lodged, and the cases on both sides printed, the Appellant John

Glegg, and the Respondent in the original appeal cause died ; whereupon the appeal cause was revived by their respective representatives.

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For the Appellants:—*Mr. Agar, and Mr. Duckworth.*

For the Respondents:—*Mr. Shadwell, and Mr. Spence.*

Upon the argument in chief, the case was put by the Appellant's counsel upon the defect of title, because the legal estate was outstanding in trustees upon a term unsatisfied. But in the reply it was urged, on the authority of *Norbury v. Meade*, that the title of a lay impropiator was not proved by the mere perception of tithe, and that the grant from the Crown and recent possession were indispensable proofs of title.

The case was argued in Nov. 1826, and stood over from that time for consideration.*

On the 18th of May, 1827, the Judgment was affirmed.

Judgment affirmed.

* It was decided at the same time with the next following case.

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ENGLAND.

(COURT OF EXCHEQUER.)

HENRY CHERRY	- - - - -	<i>Appellant.</i>
RICHARD LEGH, (since deceased),	}	<i>Respondents.</i>
WILBRAHAM EGERTON, and THO-		
MAS WILBRAHAM TATTON - - -		
DANIEL SANDBACK and JOHN MIL-	}	<i>Appellants.</i>
LER, Executors of HENRY CHERRY		
THOMAS ROBERT WILSON FRANCE,	}	<i>Respondents.</i>
and THOMAS MAWDESLEY, Execu- tors of the said RICHARD LEGH		

A lay-impropriator, who is in possession of a Rectory and perception of the tithes, subject to charges by way of mortgage, and for raising portions, (inasmuch as such mortgage &c., having permitted the possession, cannot claim the gone rents,) has a title sufficient to sustain a suit against occupiers for an account of tithes.

Upon a bill filed by such a lay-impropriator against an occupier, who had taken a lease from the rector, of the tithes of corn and grain, but expressly without prejudice to any question as to the tithe of hay, and who, by his answer, set up but did not prove, a modus as to the small tithes.—*Held*, that proof of the perception of some tithes by a lay-impropriator, without evidence of a grant from the Crown, gave a title to other tithes, of the perception of which there is no actual proof.

If the occupier shows a colour of title to the tithes not rendered, a court of equity will not interfere, but leave the plaintiff to his remedy at law.

THE Respondent Richard Legh claimed to be entitled for life (subject to certain trust-terms and to a mortgage) to the impropriate Rectory of Prestbury, and, as such, to receive all the tithes, both great and small. The Respondents, Egerton and Tatton, were trustees, in whom respectively two several terms of the Rec-

ry were vested for securing two several annuities. The Appellant, Cherry, was an occupier of land within the Rectory.

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In 1820, a bill was filed in the Exchequer by the Respondents, in the original Appeal against Cherry, stating their title as impropiators, and praying against Cherry, as an occupier who had subtracted tithes of hay and small tithes, an account and payment, waiving penalties. The Appellant, Cherry, by his answer admitting occupation and the taking of tithes, put the Respondents to the proof of their title, and set up a certain custom as to the tithe of hay, and divers moduses as to the small tithes.

The cause was heard in 1821, when proof was given of payment of tithes by Cherry to Legh, as beneficial owner, in actual possession, of the Rectory; and, as an exhibit, an agreement was proved between Legh and the parishioners by whom it was signed, and among others by Cherry, to let and take respectively, at a rent for one year, the tithe of grain; but it was expressed to be made without prejudice to any question or claim as to the tithe of hay.

On the part of Cherry, evidence was read to sustain the defence, but it failed as to the modus; and with respect to the title, proved only that the legal estate in the rectory was conveyed to and outstanding in persons having charges upon it; but a decree or account was pronounced, according to the prayer of the bill.

The Appellant, Cherry, and the Respondent, Legh, died pending the Appeal, which was revived by their representatives respectively.

For the Appellants :—*Mr. Agar* and *Mr. Duckworth*.

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For the Respondents:—*Mr. Shadwell and Mr. Spence.*

On the part of the Appellants in this case, (as in the case of *Glegg v. Legh*,) the objection to the decree, as argued in the court below, and in the printed papers, rested upon the question of *modus*, and the defect of title in the Respondent, because the legal estate was vested in trustees for incumbrancers; but finally, in the Court of Appeal, the case was argued chiefly on the authority of *Norbury v. Meade*.* And it was said in argument, that this case was stronger against the title, because in *Norbury v. Meade* there was an admission of title as to all the lands of the rectory, except one farm, and that case, in the Court below, was argued on the ground of the presumption of a grant to the occupier; but, in the House of Lords, the case of *Norbury v. Meade* was decided on the defect in proof of title by the Plaintiff. It was further argued, on the part of the Appellants, that if mere perception of tithes was sufficient proof of title, there had been no payment made to the rector by the appellant, except in respect of the tithes of corn and grain.

On the part of the Respondent:—it was argued, that the perception of tithes is a proof of title, as well in the case of lay-rectors as of ecclesiastical persons; and that in this case the payment of tithes was admitted and proved. The case was said to be clearly distinguishable from that of *Norbury v. Meade*, as in that case the Defendants, being occupiers of a distinct farm, claimed a title to the tithes of that farm, and they denied that the Plaintiff was entitled to the small tithes, on which point there was great doubt whether there had been a valid appropriation at all, inasmuch as no vicar had been en-

* Ante Vol. 3. p. 961.

ved : that in this case, no such matter was raised in the pleadings: that in *Norbury v. Meade* a case was made by the pleadings, to which the evidence of non-perception might apply : in this case, the trial of title was general ; not confined, as in *Norbury v. Meade*, to the particular tithes claimed. At the moduses set up by the answer, were an admission of the title by inference, the party being described as rector, and the allegation not being that he is not entitled to the tithe of hay, but that he is not entitled to it in kind.

In reply—it was observed on this latter argument, that the moduses were an admission of payments due to some ecclesiastical person, but not of an impropriation.

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The *Lord Chancellor*, at the conclusion of the argument, made the following observations :—

This is a case of too much importance, to give judgment immediately ; and I doubt whether judgment can be given upon the record as it now stands, without affecting a great many other cases which have been decided by this House. This proposition has been decided in the Exchequer, that if there is a lay-rector who proves that he has received all the tithes that have been paid, the Court would hold him entitled, as they would a spiritual rector, to tithes that have not been paid ; but, on the other hand, if, in respect to those tithes that have not been paid to a lay-rector, there is a color of title by deeds in the hands of a layman, upon which he may claim those tithes which have not been paid, the Court of Exchequer, applied to as a Court of Equity, will not interfere. Of the former of these propositions, I do not recollect ever to have been decided one way or the other in this House ; and if the pleadings will call upon this

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House to look at what has been decided in the Court of Exchequer, one of the most important considerations in this case is how far the judgment of this House shall or not bear upon those decisions. What I am now alluding to was discussed in the case of *Scott v. Airey*,* in which I was counsel. In that case, the rector of Simonbourne claimed all the tithes in that great parish, which is now divided into six. He proved himself to have received all the tithes of the parish, except the tithes of a particular farm which belonged to a family of the name of Airey. The Court of Exchequer, in that case, held that, having received the tithes of all the rest of the parish, he was entitled to receive the tithes of that farm, unless the Airey family could shew that they had a colourable title to the tithes under their title-deeds. That they did shew, and thereupon the Court of Exchequer refused to determine the effect of those title-deeds, holding it to be a case in which the parties must go to law for the decision of their rights. I believe no case has been decided in Equity contrary to that, as yet at least; nor do I believe there has been any decision at law upon the subject. Undoubtedly it is very difficult to reconcile with that doctrine all that Lord Redesdale has said in the case of *Norbury v. Meade*; but I believe you will find no judgment in which this House has dealt with that case so as not to support the doctrine of the Court of Exchequer.

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The *Earl of Eldon*.—In the two cases of *Glegg v. Legh*, and *Cherry v. Legh*, which stand for the judgment of the House, the question is, whether the Court of Exchequer was right in the decrees which they made in these causes respectively, for

* 3 Gwill. 1174.

an account of tithes. Two grounds of objection and appeal were taken in these cases: one was, that the owner of the impropriate rectory held it subject to terms of years for raising money portions, and likewise subject to some mortgages. He is proved to have been in possession as far as the mortgagee is concerned, and there can be no doubt that the mortgagee has no right to call for the past rents and profits; and again, with respect to any other incumbrances, I apprehend that where persons are entitled, under terms for raising sums of money, whether portions or charges, it is impossible to say that the person who is the tenant in fee, or the tenant for life subject to such charges, is not in the enjoyment of the tithes, or that such enjoyment would not be a sufficient protection against the claims of persons who should afterwards resort to the estate in respect of those incumbrances.

Another ground of defence in this case rests upon the existence of a *modus*,—a *modus* very singular in its nature, upon which I observe the Court of Exchequer hesitated in giving an opinion, whether it is worth any thing in point of law. It does not appear to me necessary to call your attention to the question, whether it is good in point of law, because, though there is some semblance of proof, there is nothing like that sort of proof which is sufficient to establish the fact of its existence. It appears to me, therefore, that, in both cases, the judgment of the Court of Exchequer is right; and unless upon looking at the petitions of appeal, any thing further should occur upon them for observation, I should propose to your Lordships that both those judgments should be affirmed.*

18th May 1827.—Judgment affirmed.

* The case was not afterwards mentioned.

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IRELAND.

(COURT OF CHANCERY.)

The Right Hon. WILLIAM CUNNING-
HAM PLUNKETT, his Majesty's At-
torney-General for Ireland, at the
relation of JOHN M'MULLEN, and
others - - - - - } *Appellant.*

The MAYOR, SHERIFFS, COMMONS, and
CITIZENS of DUBLIN, and WILLIAM
HENRY ARCHER, their Treasurer } *Respondents.*

The Corporation of Dublin having, before the year 1777, supplied water to the inhabitants of the city from works which they had constructed, but the rents which they received being inadequate to the maintenance of the water-works; by the Irish Act 15th and 16th Geo. III. the owners or occupiers of houses were compelled to provide branch-pipes from the mains of the company to the houses, and the Corporation were empowered to charge the owners or occupiers with certain fixed annual rates or rents, in order to construct new mains and extend their works, to borrow money for those purposes, and to mortgage the rates for the repayment of the money so borrowed.

Under the authority of this Act, the Corporation from time to time borrowed, on the credit of the water-rents, various sums of money, which in 1809 amounted to 67,800*l.*

In that year the Corporation obtained a new Act of Parliament, (49th Geo. III.) by which they were empowered to borrow, at stated annual periods, a further sum amounting to 32,200*l.*, and to charge the debt upon the rates granted by that and the former Acts. The Act further required, that the interest of the money borrowed under that Act, should be retained out of the rates thereby granted, as well as a further sum of 2000*l.* to be appropriated as a sinking-fund to pay off the whole debt for money borrowed under that and the former Acts. The Act further directed, that distinct accounts should be kept of the rates received under the Act, and that the surplus, after providing for the interest of the whole debt, should be applied in laying down iron or metal main and service pipes, in the general improvement and extension of the water-works, and to increase the sinking-fund; and it was declared, that the rates, being granted only for such pur-

poses, should not be subject to deductions, except for collection, nor be deemed rates for the supply of water as for sale. The Act then provided that the Corporation should furnish annually, to be laid before Parliament, an account of the sums received by them under that and the former Acts, and of the manner in which the same had been expended and applied. Finally, a further provision was made by the Act for the appropriation to the sinking-fund of any further surplus out of the rates.

In 1823, an information and bill was filed on behalf of the inhabitants of Dublin paying water-rates, against the Corporation, which, stating various acts of mismanagement and misappropriation of the funds arising from the rates; submitting that the Corporation were trustees under the Act, of rates thereby given, for uses which were charitable in their nature; and charging that the conduct of the Corporation amounted to a breach of trust, prayed (among other things) a declaration and execution of the trust, and that accounts might be taken of the rates received by the Corporation, and the application thereof; of the sums annually applied to the sinking-fund, of the money borrowed and due on the credit of the rates, and which had been applied in payment of the principal and interest of the debt.

To this information and bill the Defendants put in an answer, by which, after admitting many of the principal facts, and setting forth various accounts, they submitted that they were not trustees, that the purposes specified in the Acts were not charitable uses, that the Act required the accounts to be furnished annually to the Lord Lieutenant to be laid before Parliament; which having been done, it was a bar to the jurisdiction of the Court, of which matter they prayed the same benefit as if they had pleaded to the bill.

Held (reversing the judgment in the Court below) that the Court had jurisdiction to entertain the information and bill.

In what particular form a Corporation shall account, and to what extent they shall be made responsible upon a breach of trust, *Quære*.

The question as to interest, whether simple or compound, at what rate, and from what times, to be charged upon monies which ought, according to the trust, to have been applied or reserved, at given periods, is a matter to be reserved for further directions.

THE Corporation of Dublin for a great length of time possessed, as private property, a watercourse from the river Dodder to the city of Dublin, upon

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which they constructed a basin or reservoir, and other works for supplying the inhabitants of Dublin with water.

The Corporation having thus provided a considerable supply of water for the city, and their property in the watercourse, reservoir, and water-works being indisputable, they, previous to the year 1777, furnished water to those inhabitants who applied to them; but no inhabitant was obliged to purchase a supply of water from the Corporation, and few persons incurred the expence of laying leaden branches from their houses to the mains.

The rents which were received by the Corporation before the year 1777, for supplying water, were uncertain and inadequate to defray the expenses of supplying it.

By the Irish Act (15th and 16th *Geo.* III. c. 24), commonly called the Pipe Water Act, which was made for the purpose of providing an adequate supply of water for the increased population of Dublin, the legislature compelled all owners or occupiers of houses in the city of Dublin to provide one branch or leaden pipe, to convey the water from the main pipes belonging to the Corporation into the houses; and empowered the Corporation, in order to construct new mains and extend their works, to exact from all owners or occupiers of houses certain fixed annual rates or rents; to make regulations for the advantage of the water-works; and to mortgage the rates for the repayment of the money which it might be necessary to borrow for their improvement and extension.

Soon after the passing of the Pipe Water Act, the Respondents began to set apart for their own use a certain sum annually, as a compensation for the past benefit the

city of Dublin had derived from the use of the water-works, which, previous to the passing of that Act, had been the exclusive property of the Corporation; and they continued this annual appropriation from March 1777 to March 1809. They also continued from time to time, to borrow large sums of money on the credit of the water-rents, which, in the year 1809, had become subject to a debt of 67,800*l*.

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In the year 1809, the Corporation obtained an Act (49th *Geo.* III. c. 80.) commonly called the Metal Main Act, the chief objects of which were to substitute cast-iron metal main and service pipes, instead of the timber pipes then in use, and to enable the Respondents to exact the water-rates therein specified, in order to defray the extraordinary charges which would be thereby occasioned.

Soon after this Act had passed, great dissatisfaction began to prevail among those proprietors and occupiers of houses in Dublin who were subject to the water-rates imposed by it, respecting the manner in which the Respondents managed the funds entrusted by the Act to their care, and the means adopted by them for carrying into execution the purposes for which (it was contended) the trusts were created. In the year 1822, a select committee of the House of Commons was appointed for the consideration of this subject, among others connected with the local taxation of Dublin, and a report was made and printed. In 1823, the select committee of the house being re-appointed for the same purposes, after a laborious inquiry, came to the following resolution:—

“ That it is inexpedient to examine witnesses respecting the pipe water and metal main taxes, as it appears, by the reports of the Commissioners for auditing Public Accounts, that continued misapplica-

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tions of public money are considered by the Commissioners to have occurred ; and that it is necessary, on the part of the public, that immediate proceedings should be taken at law for the purpose of bringing this matter to a close, and ascertaining what sums remained due on the foot of those accounts ; and what right or title the Corporation possess in the pipe-water estates."

By the Metal Main Act, (sec. 11.) the Corporation was empowered to borrow at interest, upon the credit of the rates granted by the Act and the Acts therein recited, such sums of money as they should from time to time find necessary for the purposes therein mentioned, and to demise or mortgage the rates, or any part thereof, as a security for the sums so borrowed ; but the Corporation were not allowed (sec. 12.) to borrow, for the purposes of the Act, more than certain limited sums annually, from 1810 to 1814, and amounting in the whole to 32,200*l*.

By sec. 13, after reciting that there then was a debt of 67,800*l*. secured by the rates granted in the therein recited Acts, and that it was expedient to provide a fund for redeeming and discharging the same, together with the sums which might thereafter be borrowed by virtue of the provisions of the reciting Act, it was enacted, that it should be lawful for the Treasurer of the Corporation and his successors, who were thereby required annually to retain out of the rates thereby granted, which should come into their hands, the sum of 2000*l*. together with such sums of money as should be equal to the interest of the sum and sums which should be borrowed under the provisions of the Act ; which sums of money so to be retained by them should be appropriated as a sinking-fund to pay off the 67,800*l*. and sums of money so

to be thereafter borrowed, and to be applied from time to time in purchasing in the securities granted for such debts; and the treasurer to the Corporation for the time being was thereby required from time to time to retain all such interest as should become due upon all such securities and sums of money so purchased in or paid off, and to apply the same from time to time to the further aid of the sinking-fund in the same manner as the sum of 2000*l*.

By sec. 14, it is enacted, that the treasurers for the time being shall keep, or cause to be kept, a distinct and separate account of the receipt and amount of the rates granted by virtue of the Act, and should apply the balance thereof, after retaining a sum sufficient to answer the interest of the money then due or thereafter to be borrowed, in laying down cast-iron or metal main and service pipes, or in making additional alterations and improvements to the works, and in increasing the sinking-fund thereby created. And it was thereby declared that the additional rates being thereby granted for such objects only, the same should not be subject to any deductions or per-centage whatsoever (save for collecting the same), nor be deemed rates for supplying the inhabitants of Dublin with water, as for the sale thereof."

By sec. 15, it is enacted, that the Corporation should, once in every year furnish or cause to be furnished, unto the Lord Lieutenant or other Chief Governor of Ireland, to be by him laid before Parliament, a full, true, and distinct account of the several sums of money received by them, or on their account, by virtue of that Act and of the Acts therein recited, and of the manner in which the same hath been paid, expended, and applied.

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By sec. 16, it is enacted, that if there should be any surplus of the several sums of money so received by the Corporation or on their account under the Act and the recited Acts more than should be duly expended by them as aforesaid, then, and as often as the same should exceed the sum of 500*l.*, such excess should from time to time be applied in the same manner as the annual sum of 2000*l.*, until the whole of the sums of money so due and thereafter to be borrowed should be discharged; and that the rates should stand as a security for all sums of money theretofore borrowed by the Corporation on the credit or account of the pipe water-works, and the interest due and to grow due thereon, as fully and effectually as if borrowed under the provisions of the reciting Act.

In 1823, an information and bill was filed by the Attorney General, at the relation of John M'Mullen, &c., on behalf of themselves, and all other the inhabitants of Dublin subject to the payment of the water-rates, stating the facts above-mentioned, and the clauses of the Metal Main Act, and submitting that it was the intention of the Legislature ~~that~~ the Respondents should be trustees of the rates thereby given, for the uses and purposes therein mentioned, and that such uses were charitable in their nature.

The information and bill further stated ~~that~~, by virtue of the power by the Act (sec. 12,) given to them, the Respondents immediately proceeded to levy the rates thereby granted, and that it appears by the Corporation-books of the Respondents, ~~that~~ the rates so levied by the Respondents and paid to their treasurer amounted, in the year ending in September, 1810, to 229*l.* 5*s.*—in the year ending

in September, 1811, to 10,043*l.* 0*s.* 8*d.*—in the year ending in September, 1812, to 11,082*l.* 15*s.* 7*d.*—in the year ending in September, 1813, to 10,347*l.* 7*s.* 7*d.*—in the year ending in September, 1814, to 12,135*l.* 4*s.* 10½*d.*—in the year ending in September, 1815, to 10,993*l.* 2*s.* 4½*d.*—in the year ending in September, 1816, to 11,409*l.* 6*s.* 9*d.*—in the year ending in September, 1817, to 9176*l.* 16*s.* 9*d.*—in the year ending in September, 1818, to 7863*l.* 9*s.* 9*d.*—in the year ending in September, 1819, to 8488*l.* 2*s.* 6*d.*—in the year ending in September 1820, to 11,441*l.* 12*s.* 6*d.*—and in the year ending in September, 1821, to 9593*l.* 4*s.* 11*d.*—making altogether the sum of 114,865*l.* 9*s.* 3*d.*

It was further stated, that the rates so collected, together with the rates for pipe-water which the Respondents were theretofore empowered to levy, and which they did in fact levy during the said years, were abundantly sufficient to answer all the purposes of the Metal Main Act and other Acts therein recited, and to have provided for the inhabitants of Dublin more durable mains for the conveyance of water through the streets thereof, than those theretofore used, whereby the inhabitants would have had an almost uninterrupted supply of water, had the said funds been properly applied; whereas, it appeared from the books of the Corporation, and the fact was, that the original estimated length of the metal main required for the purposes aforesaid, was about 56 English miles; but that the Respondents, notwithstanding the large funds thus at their disposal, had, in the month of September, 1817, laid down only eighteen miles, four furlongs, Irish measure; and that for the two following years, which ended in September, 1819, they laid down only two miles,

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four furlongs, Irish measure; and that for the year ending September, 1820, they laid down only one mile, four furlongs, thirty-four perches, and three yards; and for the year ending September, 1821, they laid down but two miles, twenty-eight perches, four yards, Irish measure; leaving on the 29th September, 1821, to be completed of the said work, twenty-four miles, four furlongs, three perches, and three yards, English measure, of which residue scarcely any had been executed:

That at the time of passing the Metal Main Act, John Carlton, an alderman of the City, and one of the Corporation, was treasurer, and so continued till the year 1814, when the Respondent, William Henry Archer, also an alderman and a member of the Corporation, was appointed treasurer, and has continued treasurer ever since:

That the Corporation being, by the Act, empowered to borrow certain sums of money, did in the year 1810, borrow 20,000*l.* although they should have only borrowed 12,000*l.* and in the year 1811, borrowed a further sum of 6,000*l.* and in the year 1812, 4,000*l.* and in the year 1813, 2,200*l.*, for which said several sums the Corporation issued 325 debentures, and paid as a premium on the debentures issued in the year 1813, 36*l.* 9*s.* 7*d.*, making together the sum of 32,236*l.* 9*s.* 7*d.*, being 36*l.* 9*s.* 7*d.* more than the Respondents were entitled to borrow.

That, by the Act, the sinking-fund required to be created for the purposes therein mentioned, should have been formed from the four separate sources therein specified, that is to say, 1st. By an annual sum of 2,000*l.*, which the treasurer should have retained out of the rates and rents. 2ndly. By a sum equal to the interest payable on all sums of

money which should be thereafter borrowed under the provisions of the said Act, which the said Treasurer was in like manner directed to retain. 3rdly. By a sum equal to the interest of all the securities or sums of money which the Treasurer should purchase in or pay off, which sum the Treasurer was in like manner directed to retain; and 4thly. If there should be any surplus of the sums of money to be received under the Act, or any of the Acts therein recited, more than should be duly expended for the purposes of the Acts, the same so soon and often as it should exceed 500*l.* should be added to the sinking-fund:"

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That the Respondents, in the years between 1810 and 1821, omitted to reserve the sums directed by the Metal Main Act to be set apart for a sinking-fund, leaving a deficiency of the sinking-fund of 40,670*l.* 2*s.* up to September, 1821, and diverted a large proportion of the rates, applicable by the Act for the special purposes therein mentioned, to their own use, and to objects entirely unconnected with their trust:

That immediately after the passing of the Metal Main Act the Respondents increased the rent or compensation, which they had before the year 1809 appropriated to their own use, from 1500*l.* *per annum* to 2,500*l.* *per annum*: and also raised the salaries of the several officers who had been employed in the management of the pipe-water-works; and that this misapplication of the funds was also accompanied by a total deviation from the order in which the metal main rents were directed by the Metal Main Act to be applied, and the result was, that the most important object of the Metal Main Act, which was the creation of a sinking-fund for

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the liquidation of the debt of 100,000*l.*, was disregarded, and the duration of the tax was thereby indefinitely prolonged :

That the Respondents, further availing themselves of their power over the funds committed to them by the Metal Main Act, and in order to relieve their private property from its proper charges, by an Act of Corporation Assembly, voted to the Lord Mayor of the City the sum of 1,000*l.* yearly, and to the City Treasurer a like sum of 1,000*l.* yearly, to be charged proportionably on the city and pipe-water funds, as salaries in lieu of poundage ; although it is by the Metal Main Act expressly enacted, that the rates being granted for the objects therein mentioned, should not be subject to any deduction or per-centage whatsoever (except for collecting the same) :

That as the rates collected for pipe-water have not averaged 12,000*l.* a year, the poundage on which would not exceed 600*l.* a year, the substitution of a salary of 1,000*l.* a year in lieu of poundage, on a principle of economy, was totally unwarrantable.

That the Respondents alleged that such salary was to be in lieu of poundage, and charged proportionably on the city private funds and pipe-water rents ; but that in fact the salary was charged by Respondents equally on both funds, though the city private funds must have been considerably greater than the pipe-water rates, inasmuch as a charge of 2,000*l.* *per annum* on the two revenues could not have effected any saving, unless the joint revenues had amounted to more than 40,000*l.* a year ; but as the pipe-water rates did not exceed an average of 12,000*l.* a year, it was unjust to charge against such funds a yearly sum of 1,000*l.* :

That the Respondents for the first three years after the passing of the Metal Main Act considered such poundage, or commuted salary, in lieu of poundage, as sufficient remuneration for the services of their Treasurer; but in 1812, the Respondents thought proper to allow him, as an accomptant, an additional salary of 300*l.* sterling *per annum*; and he having desired that he should have such additional salary from the commencement of the Metal Main Act, the same was paid to him accordingly out of the rates, until the year 1815, when the same was discontinued :

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That in the accounts of the Respondents, in addition to the yearly rent of 2,500*l.*, the sum of 1,000*l.* a year in lieu of poundage, and the yearly salary of 300*l.* a year to their Treasurer as an accomptant, there are also contained various other items, such as a yearly sum of 312*l.*, being for interest on a sum of 5,200*l.* exceeding the debt of 67,800*l.* recognised and provided for by said Metal Main Act; a sum of about 75*l.* yearly expended on a tavern entertainment; excessive charges for interest; and other charges not connected with any of the objects of the Metal Main Act, and which, if allowed, would have the effect of creating a perpetual burden on the inhabitants, by postponing to an indefinite period the accomplishment of its object :

That although the Treasurer of the Corporation is required, by the Metal Main Act, to keep separate and distinct accounts of the rates thereby granted, and to apply the balance thereof, (after retaining the several sums of money therein mentioned for the creation of the sinking-fund,) in payment of interest, in laying down metal main and service pipes, and making additional improvements in the works ; yet,

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down to the year ending September, 1821, so far was the Treasurer for the time being from complying with the provisions of the Act, for keeping distinct and separate accounts of the rates thereby granted, that, to that year inclusive, the account of those rates had been blended with the rates granted by the several other Acts :

That the said several unjust charges introduced into the respective yearly accounts of the Respondents, amounted in the year 1821, to 39,464*l.* 17*s.* 10*d.*, exclusive of the sum of 960*l.* which the Respondents deducted from the nett receipts of the metal main rates for each year, for salaries of officers ; whereas the charge of 960*l.* was not warranted under any of the provisions of the Metal Main Act, and, in fact, the salaries charged were not paid to the officers :

That the Respondents have not in any manner settled nor passed their accounts of the rates levied under the Metal Main Act, but that such accounts still remain open and unsettled :

That the Respondents wilfully, and for the purpose of making the balance appear to be in favour of themselves, and not in favour of the relators and other persons liable to such rates, in the account of each of the years enumerated, introduced various false and erroneous items of the several amounts mentioned ; and that the Respondents, having become at length sensible either of the impropriety of so doing, or their mistake, had at length consented to give up in future some of those erroneous charges, and had then ceased to introduce such into their accounts :

That the right of the Respondents to levy the rates could not be resisted at common law, inasmuch as a general form of avowry is given by the Act,

to the persons who levy the same, and no mode whatever is provided by which the persons rated and bound to pay the rents can require an account of the application thereof:

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That the accounts of the Corporation to the year 1821, had been submitted for examination to the Commissioners of imprest accounts, who had disallowed, as erroneous and improper, charges claimed by the Corporation, to the amount of 39,464*l.* 17*s.* 10*d.*; and that the accounts contained charges improper and erroneous, besides these declared to be so by the Commissioners.

Upon these allegations and charges the information and bill prayed:—That the Respondents might be declared trustees of the rates and rents mentioned in the Act of the 49th *Geo.* III., for the uses and purposes therein declared, and that the trusts thereof might be carried into execution; and also that an account might be taken of all the monies received either by John Carlton, or by the Respondents, William Henry Archer, or by the Corporation, or any other person or persons appointed by them in each year, from the passing of the Act, in respect of the rates or rents granted by the Act, and of the application thereof, in each of those years, and of the expenses incurred in each year, in laying down cast iron or metal main and service pipes, or otherwise making additional alterations and improvements in the works; and also an account of the sums yearly applied in and towards the sinking-fund, from the time of passing the Act, and of the debts yearly paid off; and that an account might be taken of the money borrowed by the Corporation under the provisions of the Act, and due on the credit of the rates thereby granted, and of the money applied in the payment of the

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interest of the debt of 67,800*l.*, and of the money, so borrowed; and that the balance of rates or rents after deducting the expense of laying down cast iron or metal main and service pipes, or otherwise making any additional alterations and improvements in the works, might be ascertained, and applied as directed by the provisions of the Act exclusively; and if it should appear that the money produced by the rates or rents so borrowed on the credit thereof, had been applied to purposes not warranted by the Act, then, that the Corporation and William Henry Archer, or such of them as it should seem right, might be decreed to replace such money to the account of the rates or rents; and that some proper person might be appointed to receive the rates or rents granted by the Act as aforesaid; or that the person or persons who then received the same, might pay the same into Court to the credit of the cause.

The Respondents, the Corporation of Dublin, under their corporate seal, and the Respondent William Henry Archer, their Treasurer, on the 10th of February, 1824, filed their joint answer to this information and bill.

They denied that they were trustees of the rates; contending that there was nothing in the Act, which in any manner interfered with, or controlled the absolute property which the Respondents theretofore possessed in the water-course and works; and that not only the ancient works, but the new and improved works to be completed through the medium of the metal main rates, were to be, and are the property of the Respondents, unfettered by any trust whatsoever; and they submitted that the uses and purposes specified in the Act are not charitable uses. They insisted that, having furnished to the Lord

Lieutenant all accounts of the rents, up to and for the 28th September, 1821, pursuant to a clause in the Metal Main Act, and in the manner therein prescribed, the same are a bar to the jurisdiction of the Court, to call for the account prayed by the Appellant's information, or for any such accounts; and they claimed to have the benefit of the objection at the hearing of the cause, as if they had pleaded the matter in bar to the discovery and relief, or either the discovery or relief, prayed by information, or to the information itself.

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They denied that the sums received by them, or by the Respondent William Henry Archer, had been misapplied, or that the purposes for which the Act was passed had remained unaccomplished, there being upwards of 38 English miles of metal main work laid down.

They admitted that the metal main rates were still levied from the Relators, and the persons liable to pay the same; and said that they did not know whether the right of the Respondents to levy the rates could be resisted at law; but were advised that the circumstance of a general form of avowry being given by the Act, is no bar to the right of any party to contest his liability.

They said it was not true that no mode was provided by the Act, by which persons rated thereunder could require an account of the application of the rates, it being provided by the Act, that the Respondents should account to the Lord Lieutenant; and therefore they were advised that it was unnecessary and improper in the Appellant to have come to the Court for such account, and they insisted that no jurisdiction existed in the Court to call for such accounts.

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They admitted the receipt of rents since the passing of the Act; but, denying the truth of the allegations in the bill, as to the sums borrowed, and the receipts, expenditure, and appropriation of the funds, set forth various accounts referring to schedules.

They admitted that their accounts, up to 1821, were submitted to the control and inspection of the Commissioners for auditing Public Accounts, and believed that the Lord Lieutenant directed the same to be submitted to the Commissioners.

They said that the Commissioners, in each of the accounts, disallowed certain charges and items particularly specified in the 6th schedule to their answer; but not the charges or items in the information specified; and that the Commissioners did not declare the balance of each year of accounts to be such as in the information stated; but that at the end of the first year only they struck a balance, which was brought forward to the next year, and so added to the alleged balance for all the years, and for the particular balances they referred to a schedule.

They denied that the accounts contained any charges improper or erroneous, except those disallowed by the Commissioners.

They insisted that, notwithstanding the opinion of the Commissioners, the charges were not improper or unreasonable charges; and that the opinion so expressed by the Commissioners was unfounded; which they would be able to show by referring to the provisions of the Metal Main Act, which the Respondents considered to have been misconceived, or at least inaccurately stated, by the Commissioners.

They denied that such disallowed items had been

introduced into the accounts, from the impure and improper motives unwarrantably imputed to the respondents by the Appellant's information; and denied that any sum or sums of money received by them, as far as they were aware, as or for either metal main or pipe-water rates, had been in any respect misapplied or converted to the use of the Respondents, or to any use or purpose unconnected with the objects of the Act.

They admitted that they had persevered in collecting the rates, which they, the Respondents, submitted they could not, and ought not to abandon, so long as any of the purposes contemplated by the Metal Main Act remained to be accomplished; and they admitted that they had not passed or settled the accounts of the rates, otherwise than by furnishing the same, pursuant to the Act, to the Lord Lieutenant, and said that they were not aware of any other mode of passing or settling the accounts, which they ought to have adopted.

They denied the jurisdiction of the Court, to investigate the accounts, or to call the Respondents to account for their administration of the funds, there being another tribunal pointed out by the Act, to which alone the Respondents were in this respect responsible; and they submitted that, under all the circumstances, they were not to be considered trustees of the rates, so as to be subject to the control or jurisdiction of the Court; and insisted that the Appellant was not entitled to call for, nor the Court competent to administer, such relief as in the information prayed: and they objected to such jurisdiction, as if they had pleaded thereto, or demurred to the Appellant's information.

The Appellant having replied to the answer, the

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Respondents having rejoined, and issue being joined, witnesses were examined for the Appellant. No witnesses were examined for the Respondents; but one of the Appellant's witnesses was cross-examined by the Respondents, with respect to some documentary evidence:

The cause was heard on the 21st and 22d of July, 1824. The Respondents' counsel proposed, at the hearing, to read the depositions of the Appellant's witnesses, in order to prove that the Respondents' accounts had been audited by the Commissioners for auditing Public Accounts in Ireland. The Appellant objected to this course, on the ground that the effect of it would be to set up a defence for the Respondents, incompatible with that made by the Respondents themselves in their answer. The objection was over-ruled, and the counsel for the Respondents having insisted that the Respondents were not trustees of the rates, and that the uses for which the same were granted were not charitable in their nature, the Court decreed that the information should stand dismissed with costs, for want of jurisdiction.

Against this decree the appeal was brought.

For the Appellants:

Mr. Shadwell and Mr. Sugden.

The objects of the Irish Act 15th and 16th Geo. III. c. 24, and the 49th of Geo. III. c. 80; especially the latter, are charitable; and the interests thereby created, of which the Respondents are the trustees, are charitable in their nature, and consequently subject to the jurisdiction of a Court of Equity.

That the objects of these two Acts, and especially of the Metcal Main Act, are charitable, is manifest, both

because the general purpose is, by means of a heavy tax of temporary duration, to discharge a large subsisting debt, and afford a permanent supply of a necessary article of life to all future inhabitants of Dublin, at a comparatively trifling expense; and also because no houses are chargeable to the metal main rates, which do not pay to the amount of five shillings annually of Minister's money; and all the occupiers of such houses as pay to a less amount, which are extremely numerous, derive benefit from the Metal Main Act, without cost, and strictly in the way of charity.

If the uses of the Metal Main Act are of a charitable nature, the jurisdiction over them which is inherent in a Court of Equity could not be taken away by implication. It must continue to exist, unless it has been excluded by a positive declaration of the legislature. No such exclusion can be pointed out by the Respondents. There neither has been any direct exclusion of the jurisdiction of a Court of Equity, nor has any exclusive jurisdiction been given, directly or indirectly, either to Parliament or the Imprest Commissioners. No judicial jurisdiction was given to Parliament by the Metal Main Act, which requires the Respondents annually to furnish their accounts to the Lord Lieutenant, to be by him laid before Parliament, for the information of the members thereof; but it is incompetent for the Houses of Parliament, or either of them, to adjudicate upon, or correct, prospectively or retrospectively, any mistakes or misconduct of the Respondents, which the inspection of these accounts may disclose; nor was it the intention of the legislature, in ordering such accounts to be laid before Parliament, that the two Houses, or either of them, should have, nor have they thereby received, any power of dealing judi-

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cially with the same, or of preventing Courts of Equity from dealing with them in the same manner as with other trusts of a charitable nature. With respect to the Imprest Commissioners, no exclusive cognizance of these accounts can be pretended to be given to them; and unless it were, a Court of Equity must, under any supposition, be entitled to exercise with them at least concurrent jurisdiction.

As the Respondents have, by their answer, disclaimed the authority of the Imprest Commissioners to examine, and finally settle, the Respondents' main accounts, it was not competent to the Respondents at the hearing of the cause, in contradiction to their answer, to endeavour to withdraw the examination of their accounts from the jurisdiction of a Court of Equity, by showing, from the depositions of the Appellant's witnesses, or in any other manner, that the Imprest Commissioners are exclusively entitled to examine the Respondents' accounts, and that, by them, these accounts have been already examined and settled.

Even if it were admitted that the Imprest Commissioners possessed exclusive jurisdiction in examining and settling the Respondents' accounts, on its being proved that these Commissioners, upon examination and settlement thereof, found a misapplication of trust-funds to have taken place, which they have ascertained to have taken place to the amount of 37,000*l.*, as is admitted by the 6th schedule to the Respondents' answer, a Court of Equity ought so far to have entertained the present information, as to have exercised the same jurisdiction it would have done on a Master's report,—to have secured the sums misapplied, and to have given all proper directions respecting the application thereof, as well as to prevent the future mismanagement of the fund.

For the Respondents :

The Attorney General and Mr. Pepys.

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The Act of the 49th Geo. III., has established a jurisdiction to which the Respondents are expressly directed to submit their accounts of the revenue received by virtue of that Act of Parliament, and the several other Acts therein recited ; and the accounts which, by the information, are prayed to be taken under the decree of the Court of Chancery of Ireland, have accordingly been duly submitted to, and have been finally settled by, such jurisdiction.

The purposes to which the revenue is directed to be applied, are not charitable uses, nor are the Corporation trustees of the revenue, and the Respondents are not liable to render any account of their revenue in the Court of Chancery, at the suit of the Attorney General, or any other relator or person whomsoever.

If the Court of Chancery had any jurisdiction over the accounts in the information mentioned, yet it would be contrary to the principles and practice of the Court of Equity, to open accounts finally settled by a competent authority ; particularly when, as in the present case, no errors are proved to exist in the accounts so settled.

The Lord Chancellor in the course of the argument made the following observations :—

If the reference of the account to Parliament takes away the jurisdiction of Chancery, I have acted without jurisdiction in many cases. As to the supposition that the jurisdiction is transferred to another tribunal, there is an express clause in the Metal Main Act, which incorporates the former Acts. What

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might have been done under those Acts, may be done under this.

The case of the *Attorney General v. Brown*, whether ill or well decided, was not decided solely upon the ground that it was a charitable use. Upon reflection, I thought it so; but the judgment rested upon other grounds.

The Lord Chancellor,*—I cannot advise the House to proceed to judgment immediately. It is a case of very great importance to the parties, and more so as to the general doctrine to be established or overturned.

Only two cases have been mentioned which bear directly upon the main question in the cause.†

In the *Attorney General v. Brown*, the question was much argued, whether the fund was to be applied to a charitable use? After the argument, it appeared to me that it was a charitable use. But that was not

* At the conclusion of the argument.

† The *Attorney General v. Brown*. 1 Swanston, p. 265; and the *Attorney General v. Heelis*. 2 Sim, and Stuart, p. 67. In the latter case the Vice Chancellor said, "Funds derived from the gift of the crown, or the gift of the legislature, for any legal, public, or general purpose, are charitable funds, &c. It is the source from which the funds are derived, and not the mere purpose to which they are dedicated, which constitutes the use charitable, &c. Where an Act of Parliament passes, for paving, lighting, cleansing, and improving a town, to be paid for wholly by rates or assessments to be levied upon the inhabitants of the town, the funds so raised being in no sense derived from bounty or charity, in the most extensive sense of the word, are not charitable funds to be administered by the Court."

Quære as to that class of cases, where funds exist, which have been immemorially applied to purposes apparently charitable, but the source from which the funds have been derived is lost in antiquity? *Quære* also, whether rates, levied by authority of Parliament, for improving a town, are not funds derived from the gift of the legislature, and applicable to legal public purposes, within the terms of the definition?

the ground of the judgment in that case, whether it was well or ill founded ; because I was of opinion that the Court of Chancery had jurisdiction in that case, whether it was or was not a charitable use.

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The case of the *Attorney General v. Heelis*, weakens the authority of the *Attorney General v. Brown* ; because much of the doctrine of the Vice Chancellor in the former case is not reconcileable with the principle of the decision of the *Attorney General v. Brown*.

But in neither of those cases did the Court look sufficiently into the old law upon the subject.

The research which has been made by a noble Lord * into the old books as to the writ of account, rather confirms my decision in the *Attorney General v. Brown*, than the judgment in the *Attorney General v. Heelis*. But, without looking to the power in the common law to enforce the account, the jurisdiction being established in the Courts of Equity, it will be necessary, in reviewing the judgment of the Court below, to consider, 1. The law of the case according to the doctrines of a Court of Equity, if no special facts except the case out of the ordinary rule. 2. Supposing the Courts of Equity to have jurisdiction in such cases, whether any of the Acts of Parliament passed for the purposes in question destroy the jurisdiction of the Courts of Equity upon the subject ; that is, whether such powers are given by the Act as expressly, or by necessary implication, displace the jurisdiction ? The question of jurisdiction is the more material, because the Lord Chancellor of Ireland has not shown distinctly what his opinion would have been, if he had been accurately acquainted with the cases of the *Attorney*

* Lord Redesdale.

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General v. Brown, and the *Attorney General v. Heelis*. He takes notice that two judges in England have differed upon the question, and says that if the *Attorney General v. Brown* is right, it proceeds upon the ground that there is no other jurisdiction. But I do not admit that the *Attorney General v. Brown* proceeds upon that ground.

In the course of the argument, Lord Redesdale asked how the law stood in the case of Road Bills, where it was directed that the accounts should be returned to Parliament: whether such a provision took away the ordinary jurisdiction to enforce an account with the directions usual in a Court of Equity?

At the end of the argument, the following observations were made by

Lord Redesdale.—There has not been in this case a sufficient investigation of the ancient law and practice on the subject of account. It seems to have been conceived that the common law had provided sufficient means for calling to account all persons liable to account. But it was found by experience, that the writ of account was a very imperfect and inefficient mode of proceeding.

In the case of an individual, there can be no doubt, that if a person had received the rents of an estate belonging to a minor for which he would be accountable, the law provided a writ to call such person to account, and to compel payment of what should be found due upon the account. Yet it is every day's practice, although the common law has provided this remedy, for Courts of Equity to take upon themselves the investigation of accounts on behalf of infants suing by their next friends. The

writ of account at common law, did not exclude, but rather was superseded by, the jurisdiction of the Courts of Equity on this subject; because the proceeding in Equity was found to be the more convenient mode of calling parties to account,—partly on account of the difficulty attending the process under the old writ of account, but chiefly from the advantage of compelling the party to account upon oath, according to the practice of Courts of Equity.

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There is, on this subject, a writ in the Register,* which recites, that the King had been given to understand that his predecessors had granted certain rates on all merchandise brought into a town, to be applied to the walling of the town; and the inhabitants having complained that the rates collected had not been duly applied, the writ proceeds in the nature of a commission for taking the account. Under such circumstances, an information at this moment would lie at the suit of the Attorney General for taking such account. The practice of proceeding by information rather than by the writ of account has prevailed, in consequence of the difficulty of proceeding under the writ. That persons under such circumstances should be rendered accountable by virtue of the writ, is said to be according to the law and custom of England.

The practice of proceeding by information or by bill filed in a Court of Equity has arisen from the difficulties attending the process by writ. The King, as *parens patriæ*, may institute a suit by his Attorney General. It is not essential that Relators should join in the suit; but it is the common course to join them in the suit, in order that the Defendants may not be oppressed, without remedy, by vexatious suits,

* Reg. Brev., p. 138.

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the Relators being liable to costs, which are never paid by the Crown.

The main question in this case is, whether any other mode of proceeding is exclusively provided by the statute.

As to the Acts for taking accounts of public money, it will be found, upon examination, that they cannot apply to the subject. Those Acts only substitute Commissioners for the Auditors of Imprest, and direct that in certain cases in which public money is advanced in the nature of imprest, the commissioners should take such accounts. This must be confined to the cases enumerated in the Acts, otherwise there is no purpose to be answered by enumeration. A larger construction would extend the Acts to many cases which never could have been within the view of the legislature in passing the Acts; and in such a sense, any imposition by Act of Parliament might be called public money.

As to the provision for laying the account before the Houses of Parliament, can it be considered as an effective account? They can neither take such account, nor order payment of the balance, nor compel the proper application of the money.

To effect such purposes, the two Houses could only proceed by Act of Parliament; and if they had independent and distinct powers, one House might draw the result of one balance—the other House might come to a different result. In such a case, which of these conflicting balances should be paid? Could either House appoint a committee to examine the account item by item, or require vouchers? Suppose them competent so to do, and that process being adopted, they should discover an improper application of the public monies or trust funds;

what could they do but order the Attorney General to file an information against the parties? The subject requires mature consideration; for if this House should determine that Courts of Equity have no jurisdiction upon the subject, it will remain to be considered what effective remedy parties will have in cases of this description.

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If the necessity for raising the rates had ceased under the provisions of the Act, there is a power to resist, by common law, the payment of the money; but that fact is the result of an account, and can only be shewn by taking the account and ascertaining that the incumbrances are discharged.

The Act directs the application of the revenues to reduce the principal debt; but in the case of a misapplication of the funds to purposes not authorized by the Act, the debt might have remained undischarged, and then the remedy at common law would not have arisen. It was said that the proceeding was premature; but it was necessary to enforce the proper application of the funds, and was in the nature of an injunction to stay waste. If, from the probability of the misapplication of the funds, the incumbrances were likely to be prolonged, a case arose in which it was proper to apply to a Court of Equity in order to ascertain the facts and prevent the misapplication. In the case of a deed of trust, if the trustees, being directed to keep down the interest of incumbrances, and also out of the trust funds to pay off the principal of incumbrances, the parties interested under the deed might apply to a Court of Equity, and complain that the funds being available for that purpose, were not applied to the discharge of incumbrances, and that the interest upon the incumbrances was therefore

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continued without necessity. Whether the incumbrances were, or were not discharged, the parties interested have a right to be informed of the fact by proceedings in a Court of Equity.

As for the Auditors of Imprest, it is clear that they are unable to grant relief: they could not order the specific application of any money; they could only order payment into the Exchequer. They might declare that the Corporation had been guilty of misapplication, and might declare them to be liable; but could they charge them with the default, and provide a remedy for the misapplication?

But even if the account could be effectively taken by the Auditors or the Commissioners of Public Accounts, or by Parliament, I doubt whether the jurisdiction of the Court of Chancery would be excluded. It is important to ascertain, how far such Corporations are liable to account in Courts of Equity. As to the cases where Courts of Quarter Sessions are authorized to take accounts, it is purely as matter of account debtor and creditor; and if a balance bearing interest is ascertained to be in the hands of one of the accounting parties who is chargeable, there is no jurisdiction to compel the payment. It is an important question, worthy of serious consideration, whether the jurisdiction in these cases is to be limited to the mere matter of account, excluding the power of correcting malversation and misapplication; as where, under a trust for the purpose, the funds have not been applied to the payment of debts bearing interest. In the case of hospitals and other public institutions, where money for specific purposes has been granted by Parliament, or money borrowed to erect buildings, or for other purposes under the authority of an Act, if it should appear

upon the taking of an account, that the debt has not been extinguished in consequence of a misapplication of the funds, a mere account to be rendered to Parliament would not remedy the evil. In such cases, is the jurisdiction of the Court of Equity excluded? is the justice extended to individuals, refused in the case of public bodies?

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It is expedient, in such cases, that there should be a remedy, and highly important that persons in the receipt of public money should know, that they are liable to account, in a Court of Equity, as well for the misapplication of, as for withholding, the funds. Suppose even the case of a public accountant clearly within the Act, who, having embezzled or misemployed the public monies, had rendered accounts which were imperfect or fabricated—could not the Attorney General, upon discovery of the fact or the fraud, proceed by information to recover the monies so fraudulently withheld or misappropriated? It has been said, by high authority, that such a right vests in the Attorney General by virtue of his office, and that the Court of Exchequer, upon such information, has jurisdiction to order such person to account and pay the money. A similar remedy is applicable, as I conceive, to any other person having the trust and management of public money; any public accountant of any description.

As to the remedy before the Commissioners of Public Accounts, they can only take the account as it is presented before them by the accountant. They have only the ordinary means of calling the party to account. If a defective or fraudulent account is passed before them, does no remedy exist for such an abuse? The case now before the House is so important in all its bearings, involving so much of the great principles of the general administration

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of justice, that it is highly necessary the House should enter fully into the question of jurisdiction.

Lord Redesdale.—This is an information which was filed by His Majesty's Attorney General in Ireland, in consequence of an investigation which had taken place respecting certain duties which were to be levied upon persons who are householders and owners of houses in the city of Dublin, and the liberties of that city, for the purpose of paying the Corporation of Dublin a remuneration for the supply of water, which was to be afforded to the citizens of Dublin. It is unnecessary to enter into the whole subject; the question which is now before your Lordships being properly merely a question whether a proper mode of proceeding has been adopted in this case for the purpose of compelling the Mayor and Corporation of Dublin to account for certain rates which they are entitled to receive under the authority of an Act of Parliament, and to apply them according to the terms of that Act of Parliament, or whether the persons who have instituted this suit have not mistaken their remedy, because another jurisdiction is supplied by the Act which authorized the establishment of those rates and duties, or by a more general Act which directed certain public accounts to be taken in a particular way. Looking into a note with which I have been furnished of what was the judgment of the Lord Chancellor of Ireland, I find that he thought fit to dismiss this information as being improperly instituted, and that judgment seems to be founded upon an idea that there was another jurisdiction, and that that jurisdiction was before the Commissioners of Public Accounts. It has been contended at your Lordships' bar, that there is no jurisdiction, in consequence of the Act

which creates these duties having directed that the Mayor and Corporation of Dublin should lay their accounts before the two Houses of Parliament. It seems to me most singular, that directing the accounts to be laid before the two Houses of Parliament, who are perfectly incompetent to take the accounts, who never act in the character of a Court of Justice for any such purpose, that the mere laying those accounts before the two Houses of Parliament, should defeat every jurisdiction which would have a right to take those accounts if that provision had not been made. I do not find that the Lord Chancellor of Ireland so considered it; he conceived that the accounts might be properly taken under the Commissioners for examining and taking the public accounts, as they are called. The Act passed for the purpose of taking and directing the manner of taking the public accounts; that is, accounts relating to the public monies applied for the public purposes of Government, which may be for special purposes directed by the Government of the country; proceeds, it is true, to give to the Commissioners of Public Accounts a jurisdiction with respect to certain establishments to which either the Parliament of Ireland, whilst it was a separate Kingdom, or the Parliament of the United Kingdom after the Union, had granted certain sums of public money in assistance of their funds; but all those are specially enumerated in the Act, and distinguished from what are called public accounts, it being the clear construction of the Act, that what are called public accounts are the accounts of the application of public money—that money which belongs to the State, and not the application of money not belonging to the State. If a general jurisdiction of this description had been intended, the Act of

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Parliament would unnecessarily have mentioned these particular establishments. There was no occasion to mention them, according to the argument in this case: but by mentioning them specially and particularly, it is clear that the Act of Parliament did not intend by the words "public accounts," to include any accounts of this description. I take it therefore to be perfectly clear, that the Act of Parliament for taking the public account does not extend to this case. But there is a power given in the Act of Parliament, in certain cases, to the Lord Lieutenant to order certain accounts to be taken by the Commissioners of Public Accounts: those are special cases, and this is not one of those special cases. But suppose it had been one of those special cases, here the Lord Lieutenant did take upon himself to order the Corporation of Dublin to account before the Commissioners of Public Accounts, and the Commissioners of Public Accounts proceeded, though imperfectly, to take the accounts, and in the course of taking those accounts, they reported a misapplication by the Corporation of Dublin to a very considerable amount. What was to be done upon the Report, supposing that they were authorized to make the Report? Suppose the Lord Lieutenant had authority, and had authorized them to make the Report, what could be done upon it but that which has been done; namely, to institute a suit in the name of the Attorney General for the Crown to compel the application—the proper application of that money which the Commissioners of Public Accounts had stated to be misapplied. Look at the Act of Parliament for taking public accounts of any kind, either the public accounts relating to the public money, or those particular cases which are specially mentioned in the Act, in which a juris-

On is given to them. If those Commissioners
 -t any balance or misapplication, what is
 mode of proceeding? The Act of Parliament
 it shall be by information, by proceedings on
 part of the Attorney General, according to the
 ary course of proceeding, for the purpose of
 pelling those who have money in their hands
 ought to have been applied to a particular
 ose, to apply it either to that purpose, or to pay
 nto the Exchequer, in the manner in which,
 ording to the result of this transaction, the money
 ght to be applied. Does it not show, with respect
 accounting for any part of the public revenue,
 at proceedings must be had to enforce the payment
 that money, or the execution of that which the
 mmissioners of Public Accounts should report
 ght to be done. I therefore confess that I cannot
 nceive what objection there can possibly be to the
 ode of proceeding which has been adopted in this
 se, because there never should be a wrong without
 remedy. Our law will not allow such a defect of
 stice; our law has provided certain modes of pro-
 eeding in different cases, and the ancient law
 nerally proceeded by certain regular forms, which
 ere writs contained in a collection called the
 egister of Writs, which writs were renewed ac-
 ording to certain cases which had occurred, by the
 rsons authorized to frame the minutes.

It was specially enacted by a very ancient statute,
 at if the forms which had been provided were
 ufficient for particular purposes, the persons
 thorized by the Act should devise new writs
 the purpose. But circumstances (which we see
 referring particularly to them) induced the per-
 ns who had that authority to be very sparing in the
 ercise of it, and in consequence of that practice,

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the particular writs which were actually framed either by the ancient law or under the authority of this particular law, were not always adapted to the purposes for which they were designed; but if no new writ was framed for the purpose, the Courts of Law were content to use the writs, such as they found them, and apply them, though in some cases not exactly conformable to the exigency of the writs, and the reason given was, that no other writ was provided, and the wrong must not be without a remedy.

The law of Ireland is founded upon the law of England, by the adoption of the law of England in Ireland; and in the establishment of the Courts in Ireland, the same law which remains in England with respect to the Court of Chancery, the Court of King's Bench, and the Court of Exchequer, became the law of Ireland; and, therefore, if in this country a remedy was provided by writ, a remedy by writ might also be had in Ireland. Looking into the Register of Writs in this country, it seems to me that the remedy which was provided by the ancient law was an imperfect remedy, but a remedy was provided by the ancient law for a case of this kind. In early times, our Kings took upon themselves by prerogative to grant certain duties very much resembling these duties, for the benefit of towns and cities; to wall towns, to pave towns, and for various other purposes. There are, in the Register, writs expressly adapted to that purpose, reciting the grant, by some remote ancestor of the King, of certain duties which were to be applied to the walling of towns, or paving towns, or other public purposes; and that those duties so taken had not been so applied; and not having been so applied, the writ authorized certain persons to call before them the persons whose duty it was to

unt, and to direct whatever should be in their
ls to be applied according to the original in-
on of the grant, until the whole should be ap-
l according to the intention of the grant.

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re are referred to the statute of Elizabeth, with
ect to charitable uses, as creating a new law upon
subject of charitable uses. That statute only
ted a new jurisdiction, it created no new law; it
ted a new and ancillary jurisdiction; a jurisdic-
borrowed from the elements which I have men-
d; a jurisdiction created by a commission to be
d out of the Court of Chancery to inquire whe-
the funds given for charitable purposes had or
not been misapplied, and to see to their proper
ication: but the proceedings of that commission
made subject to appeal to the Lord Chancellor,
he might reverse or affirm what they had done,
ake such order as he might think fit for reserv-
the controlling jurisdiction of the Court of
ncery, as it existed before the passing of that
ite, and there can be no doubt that, by informa-
by the Attorney General, the same thing might
lone. While proceedings under that statute
in common practice, (as appears in that col-
on which is called Duke's Charitable Uses,)
will find it stated, that in certain cases,
ugh a commission might issue under the sta-
an information by the Attorney General was
better remedy. In process of time, indeed, it was
d that the commission of charitable uses was
he best remedy, and that it was better to resort
to the proceedings by way of information in
name of the Attorney General. The right
h the Attorney General has to file an informa-
is a right of prerogative; the King, as *parens*
æ, has a right, by his proper officer, to call upon

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the several Courts of Justice, according to the nature of their several jurisdictions, to see that right is done to his subjects who are incompetent to act for themselves, as in the case of charities and other cases; the case of lunatics, where he has also a special prerogative to take care of the property of a lunatic; and where he may grant the custody to a person who, as a committee, may proceed on behalf of the lunatic; or where there is no such grant the Attorney General may proceed by his information.

I take this case to be one which falls precisely within the description that I have mentioned. I apprehend it is one in which, according to the practice of the ancient law, such a commission as this which is to be found in the Register, might have issued; because the persons who collect these rates are to account for the application of them, and to apply them accordingly. In this case, one part of the question arises from a provision in the Act of Parliament, that when a certain sum should have been discharged, part of the duties should cease; that then they should be no longer levied. For the purpose of effectuating this, there were different provisions in the Act of Parliament, and amongst others a direction for the application of a certain sum in the reduction of this debt, a fund constituted for the purpose of more effectually relieving and putting an end to this debt as soon as the collection of rates would admit, and when that debt was perfectly satisfied, then the rates themselves were to cease. It has been objected, that if these rates had actually ceased by the payment of the debt which they were appropriated to pay, then the persons upon whom the rates had been levied, or against whom they were sought to be levied, might proceed at common law for the pur-

pose of defending themselves against the rates, and if the rates had been improperly levied, to recover back what was so levied; and they urge that it is not pretended that the debt is actually extinct, but that the funds had not been applied in such manner as they ought to have been for the purpose of the extinction of the debt. Supposing the debt not to be extinct by the collection, have not the persons upon whom the rates are levied, and has not the Crown on behalf of those persons from whom they may be in future levied, a right to see that the funds are properly applied according to the directions of the Act? Now how were they to be applied in the gradual extinction of the debt? In paying certain portions of it; in creating a fund which should operate by degrees to the extinction of the principal of a portion of the debt, lessening consequently the interest that was to be paid out of the same fund, and then gradually to extinguish the whole.

If persons are entitled to the benefit of a trust of any description; for instance, persons who are interested in a fund which for a certain period is to be applied to the extinction of a debt; are they not to have a right to call from time to time for an account, for the purpose of seeing that every sum as it has been received, should be applied according to the exigency of the particular trust, as in the extinction of so much of the principal of the debt to which it could be applied, and consequently in extinction of so much of the interest, reducing the amount of the interest by degrees, and thus effecting the earlier reduction of the principal of the debt? Even suppose the Court of Commissioners of the Public Accounts have a right to take the accounts, and they find that monies to the amount of near 40,000*l.* have

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not been applied according to the terms of the Act of Parliament, is it the same thing merely to call for the account to ascertain the default of that sum of 40,000*l.*, and to compel the proper application, even with interest? because, if it had been applied according to the directions of the Act of Parliament, it would have operated so much quicker to the extinction of the debt.

Under these impressions, I confess I am at a loss to conceive upon what ground the account now sought by this information can be resisted. That it is a case in which the Mayor and Corporation of Dublin, are accountable persons ;—in which an Act of Parliament has provided particular directions for the manner in which they should apply what they should receive under the authority of that Act, is not a question. The accounts which they are ordered to render to the two houses of Parliament, are mere accounts upon which nothing can be done but as the two Houses of Parliament might think fit to direct, when one House of Parliament might proceed one way, and the other House another way. And, after all, if one House were to appoint a Committee to examine into these accounts, and to inquire of the persons who are about to come before them, as it were, rendering those accounts, and they rendered those accounts, what could the House do when it had taken the accounts? could it order payment? and is that a part of the jurisdiction of the House of Commons, or of this House, proceeding as a House of Parliament, and not as a Court of Justice? We should be acting against the constitution of the country, if we assumed any such authority. It would be rather extraordinary

rine to hold that either House of Parliament, pendent of the other House of Parliament and Crown, can act for any legislative purpose, or for purpose except so far as this House is consti- d a Court of Judicature, in which capacity it t act as a Court of Judicature. The House of mmons, for certain purposes, is capable of acting ie public accuser, but the House of Commons at just as well attempt to try and condemn a on whom, according to the usage and practice Parliament they thought fit to impeach, as pro- l in the manner in which it is suggested in argu- t they might proceed. Those who constitute House better understand the constitution of the ernment of this country, than to attempt any a proceeding. There was a time when such pro- lings were attempted, but the result was the rthrow of that constitution of which the House of mmons formed a part.

conceive, therefore, that with reference to this e, there can be no doubt but that, in default of other jurisdiction, the Court of Chancery in and had the jurisdiction by the information of Attorney General, with or without a Relator; for Attorney General might have filed this informa- without a Relator. The Relator is introduced perly by the Attorney General, that there may ome person responsible for the cost of the pro- dings, if finally there should be an opinion in

Court that the information has been improperly tituted, or if in the course of the proceedings it ould be in any manner improperly conducted. is for the benefit of the subject that the Attorney neral in all those proceedings provides persons to

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be responsible as Relators in the information, that the Court may award against them what the Court cannot do against him.

Under these impressions, it seems to me that it is your Lordships' duty to reverse the decree which has been pronounced; that the accounts which have been taken before the Commissioners of Public Accounts, have been taken by persons who had no authority to take the accounts; that the result of the investigation upon the subject, amounts to nothing, except as it affords information upon the subject. If, in fact, the Commissioners had jurisdiction upon the subject, still I conceive that, upon this information, the Court of Chancery originally might have proceeded to order, that that which the Commissioners of Public Accounts report, should be carried into execution; for I know not how any report of the Commissioners of Public Accounts, can be carried into execution, but by means of the ordinary courts of justice. In the Act framed for passing the public accounts before the Commissioners of Public Accounts, even with respect to the public revenue, the proceedings to enforce the payment of any thing that may be due in relation to the accounts, must be by the ordinary proceedings in a court of justice. I therefore think your Lordships ought now to proceed to reverse the judgment (dismissing the information, and ordering the Relators to pay the costs) which has been given by the Court of Chancery in Ireland, and to direct, on the contrary, an account to be taken of the receipt and application of the duties in question, according to the exigencies of the particular case; following nearly the terms of the prayer of the information. I reserve the

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consideration of costs, until it shall appear what is the true result of that account; and in so doing, your Lordships, I apprehend, must direct, as to the several sums of money which have been received by the Corporation for the duties in question, that an inquiry shall be made, whether they have been applied according to the terms of the Act of Parliament; particularly in creating what is called a sinking fund, and in the application of the money, first to the payment of the interest, and then in the reduction of the principal, in the very words provided for by the Act of Parliament. If the result of that inquiry should be, that the Corporation of Dublin have not applied the funds according to the Act of Parliament, it will remain to be considered in what manner the Court of Chancery in Ireland should then have jurisdiction upon the subject, and would be able to proceed to do justice. In what I propose to your Lordships to do, I propose to prevent further injustice, supposing injustice to have been done. How far, upon the report of the accounts to be taken in the Court of Chancery, the Corporation of Dublin can be compelled to do now retrospectively, what they ought to have done, from time to time, as the funds came to their hands, may be a question of considerable difficulty, considering the nature of a Corporation, and the funds which may belong to a Corporation; but if it were the case of an individual—if an individual, being a trustee for the payment of a debt, and receiving funds for the payment of that debt, with a provision, clear and distinct, in the deed creating the trust, that out of the funds so reserved, a certain sum should be applied until the extinction of the debt, or carried to a

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sinking fund, or applied in any particular way, and that person so intrusted, did not think fit to observe the directions of the trust under which he acts, but retained that money in his own hands, or applied it for purposes to which it was not applicable; it would be a consideration, according to the circumstances of the case, in what manner justice should be done to the persons who were injured by such a misapplication of the funds? It might be in the shape of an action for damages, or in the Court itself charging the trustee with compound interest, according to the nature of the particular case, in such a manner as to do justice to the persons who were injured by his misconduct. That is a subject which can only be properly entered into after the account shall have been taken, and it shall be shown what is the misapplication which is complained of. The proceeding appears imperfect upon the report of the Commissioners of Public Accounts, and, indeed, the Commissioners of Public Accounts seem to have felt they were not competent to the undertaking, although the Lord Lieutenant had thought fit to refer the account to them, and the Corporation of Dublin choose to come before them. They seem to have felt themselves not competent; and besides that, the Corporation of Dublin did not conceive they were bound by the account, for in their answer to this bill, they object to the account. How then can it be said, that that account is to bar these proceedings? And yet that is the ground upon which, as I understand it, that information was dismissed.

It will require some little time to frame an order for your Lordships to make upon the subject; but I think that this decree ought to be reversed, and

that directions ought to be given upon the information filed by the Attorney General. I also think that it may be a subject of inquiry and of a good deal of consideration, in what manner the order to be pronounced, should be framed. A precedent cannot be obtained, and therefore the House must endeavour to act upon that which the justice of the particular case requires, without the assistance that might be derived from other similar cases. In that case* of a proceeding under a special Act of Parliament, which your Lordships thought did not give the authority assumed in the case, the Court of Chancery certainly proceeded upon the idea of making a Corporation responsible for the acts which had been done; and although the Corporation itself had derived no benefit from those acts at all correspondent with the sum of money which had been reported to be due from them, in consequence of what had been done, they were charged with that amount as the consequence of those acts.

I cannot but consider this as a proper proceeding, and that it is within the regular jurisdiction of the Court of Chancery, and that it is a case in which the Corporation of Dublin might be charged out of their general funds, to make good the loss to that particular fund by the misapplication complained of. It appears to me, that the subject ought to be reserved for future consideration. The account ought to be simply directed according to the provisions of the Act of Parliament, reserving all further directions, until the result of the account shall be ascertained.

* *The Corporation of Ludlow v. Greenhouse*, in which Lord Redesdale expresses a doubt whether a Court of Equity can award compensation in the nature of damages for a breach of trust. *Ante*, p. 58.

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The Lord Chancellor.—I propose to postpone the further consideration of this case till Monday next. It appears to me to be extremely desirable that my noble and learned friend would be pleased to sketch out, in some degree, the order which ought to be pronounced; because one great difficulty I have had in the consideration of this case has been, what we are to do in enforcing the payment of what shall appear to be the balance of the account taken with respect to the Corporation. My noble and learned friend seems to think that we ought to reserve the question whether we can, or cannot, effectuate our decree. That is a point which is deserving of some consideration before we make the decree.

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The Earl of Eldon.—The mere question here is, whether the Lord Chancellor of Ireland did right in having dismissed this information, and having dismissed it with costs. There was no place for much argument on the question, whether, regard being had to the nature of the case stated in this information, the Court of Chancery had, or had not, a jurisdiction. The Lord Chancellor of Ireland being of opinion, that if the Court of Chancery had jurisdiction independently of the circumstances which formed the ground of the decision, yet there are peculiar circumstances in the case that would deprive the court of its jurisdiction.

When this case was argued at the bar, two cases were cited, which had been heard in the Court of Chancery in England, one before myself, the case of *The Attorney General v. Browne*, and another, I believe, by the present Master of the Rolls, *The Attorney General v. Heelis*; and it is but fit to state that although I was of opinion, in that case of *The*

Attorney General v. Browne, that the purpose for which certain tolls were appropriated, was a purpose that made the establishment of those tolls, an establishment for a charitable use, I was of opinion it was not necessary that it should be a charitable use, to give the Court of Chancery jurisdiction upon the subject. But my judgment in that case proceeded upon this ground: that the court had a jurisdiction to call upon persons intrusted with the application of those tolls, which were granted for the purpose of supporting banks to protect the land from the inroads of the sea. I thought that the Court of Chancery had a right to direct an account of those tolls to be taken. The authority of that case is considerably weakened by the opinion given by the present Master of the Rolls, then Vice Chancellor, in the case of *The Attorney General v. Heelis*, inasmuch as the reasons on which he proceeded, were considerably different from those on which the judgment was founded which I thought myself bound to give, in the prior case of *The Attorney General v. Browne*.

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The Lord Chancellor of Ireland, in the present case, was of opinion that, inasmuch as the Act of Parliament had directed the accounts to be laid before the Lord Lieutenant of Ireland, and before Parliament or before the Commissioners of Public Accounts, that such a direction constituted another jurisdiction, and that, therefore, the Court of Chancery had no jurisdiction upon the subject. To the industry of a noble and learned Lord,* we are indebted for having established, in what he stated for your Lordship's consideration, that old authorities justified him in saying that a writ of account

* Lord Redesdale.

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might be brought, according to the old forms of the law, for the purpose of calling such parties to account, and he reasoned satisfactorily, at least to my humble judgment, that if a writ of account could have been maintained, a suit in Chancery would be also capable of being maintained, unless the jurisdiction of the Court was expressly, or by necessary implication, taken away.

The Lord Chancellor of Ireland, advertng to that case of *The Attorney General v. Browne*, stated, that according to the facts embodied in the report of the case, it appeared that there was no other jurisdiction, and that the Court of Chancery in England probably was induced, by that circumstance, to think there must be a remedy somewhere, and that therefore the Court of Chancery was competent to decree the account which, in that case, the Court directed to be taken. I am most clearly of opinion, that, admitting the Act of Parliament ordered this account to be laid before the Lord Lieutenant, who is to lay the account before Parliament, and that the Commissioners of Public Accounts, have some authority likewise in taking such accounts, that this provision does not oust the jurisdiction of the Court of Chancery, because that jurisdiction cannot, in my judgment, be taken away but by express words, or by words creating a necessary implication to that effect; and, in every view which I can take of this case, I cannot imagine why the direction that the Lord Lieutenant should be informed of the state of the accounts, and that the Commissioners of Public Accounts should look into these matters, and that Parliament should have the accounts laid before them, should have such an effect. It appears to me that those are measures

rather ancillary to the jurisdiction of the Court of Chancery than measures to oust the Court of Chancery from its jurisdiction. Upon the whole, I cannot entertain a doubt that, in this case, the Court of Chancery has a jurisdiction which has not been taken away by any enactment contained in this Act of Parliament regulating those institutions to which it refers. My opinion is, that in this case the Court of Chancery having jurisdiction, the bill ought not to have been dismissed.

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I have prepared, with the assistance of my noble and learned Friend, some minutes of the judgment which I propose to your Lordships to pronounce. I have likewise been furnished by the parties with other minutes, in which notice being taken that the costs which were given by the Lord Chancellor have been paid into the Bank, those minutes provide for the repayment of those costs, which certainly ought not to have been paid if the bill ought not to have been dismissed, and they further provide for the costs of this appeal. With respect to the former costs, I do not apprehend it is necessary for your Lordships to say any thing upon the subject, because if you reverse the Lord Chancellor's decree, it will be of course on application that an order will be made to have those costs paid back again. With respect to the costs of this appeal, it being an appeal from the decision of the Lord Chancellor of Ireland, it is not according to the usage of your Lordships' House to give such costs. I should, therefore, upon the whole submit to your Lordships, that the minutes which I have now in my hand should form the judgment of your Lordships. For the purpose of taking care that there should be no alteration hereafter,

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perhaps it will be proper that the parties should have an opportunity of seeing these minutes which are now put upon your Lordships' table ; and, in case nothing is said in the course of the morning to induce your Lordships to alter them, I propose, with the leave of the House, to-morrow, to move that the decree should be reversed, and that the judgment of this House should be conformable to those minutes.

Lord Redesdale.—Having already given my opinion with respect to this case at length, I will not trouble your Lordships further upon the subject. My opinion perfectly concurs with that of the noble Lord who has just addressed you. With respect to the costs in the cause, your Lordships often, in reversing a decree, are in the habit of giving further directions to the Court of Chancery, and, in order to carry your order into execution, to direct the repayment of costs. The minutes which have been proposed are framed with a considerable degree of particularity from the Act of Parliament under the authority of which the particular revenues were raised. They are very minute, and therefore, I think it is proper that the parties should have an opportunity of looking at them before they are finally made the order of the House, because it is possible, in going through an Act of Parliament containing a vast variety of provisions, something may have escaped notwithstanding the attention I have given to the minutes, and they may not be expressed with perfect accuracy. My object was to make an order for the purpose of carrying into execution the particular provisions of the Act of Parliament as I found them in the Act.

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Ordered and adjudged,* that the decree complained of be reversed, and it is declared that, by the terms of the Act of the 49th Geo. III. intituled, "An Act for the better supplying of the city of Dublin with Water," the Respondents are bound to account for and apply the several rates and rents in the said Act mentioned in the manner expressed in the said Act, so far as the said Act relates to such rates and rents respectively. And, it is further ordered, that it be referred to one of the Masters of the Court of Chancery in Ireland to take an account of all sums of money received by the said Respondents, or by any person or persons by the order, or for the use, of the said Respondents in each year, from the time of the passing of the said Act, for or in respect of the rates and rents granted by the said Act, and of the application thereof respectively in each year, and particularly of the expenses incurred by the said Respondents in each year, in making reservoirs and laying cast iron or metal main and service pipes, or other alterations and improvements authorized by the said Act, and to state the balances of such account appearing at the end of each year respectively; and also an account of all sums of money which the said Respondents borrowed at interest upon the credit of the rates and rents granted by the said Act, and by the Acts therein recited, and which were necessary for the purpose of making such reservoirs and laying such cast-iron or metal main and service pipes; and also an account of the several demises or mortgages of the said rents, or any parts thereof for such purposes, and of the costs of such demises or mortgages, and to whom such demises or mortgages have been made, and for what sum or sums respectively; and whether such sum or sums of money so borrowed exceeded or fell short of the several sums authorized by the said Act to be borrowed in the several years therein mentioned respectively. And it is further ordered, that the said master do inquire and report the nature and particulars of the debt of 67,800*l.* in the said Act mentioned, and to whom such debt was due and how incurred, and at what rate or rates of interest, and whether a fund has been duly provided according to the directions in the said Act for redeeming and discharging the same, and all such further sum and sums and

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money as have been borrowed for the purposes and within the several periods authorized by the said Act; and whether the treasurer and treasurers for the time being of the said Respondents have annually retained out of the rates or rents granted by the said Act, the sum of 2000*l.* together with such sum or sums of money as would be equal to the interest on all such sum and sums of money as have been borrowed under the provisions of the said Act; and whether all such sum and sums of money by the said Act directed to be so retained have been appropriated and applied as a sinking fund to pay off and discharge the said sum of 67,800*l.* and all such other sum and sums of money as have been borrowed under the provisions of the said Act; and whether all such sum and sums of money so directed to be retained and appropriated have been for such purpose laid out in purchasing securities granted or passed for the debt and debts in the said Act mentioned, or any of such debt or debts; and whether all such interest money as have become due and owing on all the securities, sum and sums of money so purchased in, paid off, or discharged, has and have been applied in aid of the said sinking fund, according to the directions of the said Act, or whether the whole or any and what part or parts of such sum and sums of money has or have not been applied as directed by the said Act, and how the same respectively has or have been applied. And it is further ordered, that the said Master do inquire and report whether the treasurer and treasurers of the said Respondents has or have kept such separate and distinct accounts as directed by the said Acts of the receipts and produce and amount of the rates and rents granted by the said Act, and received under and by virtue thereof, and has or have paid and applied such part of balance thereof as from time to time remained after the retention of the several sum and sums of money directed to be otherwise applied, as in the said Act mentioned, in payment of the interest from time to time due on the money mentioned in the said Act to be then due and owing or borrowed under the authority of the said Act, and in laying down cast-iron or metal main and service pipes, or otherwise making such additional alterations and improvements in the works in the said Act mentioned, and in increasing the sinking fund created

the said Act; and whether any deduction has been made in the said rates and rents, save for collecting the same, and, any, what deduction and on what ground; and whether any plus has been at any time or times, and when, received by said Respondents, or on their account, more than had been at any time to time duly expended as directed by the said Act: and whether such excess has at any time or times, and when, exceeded the sum of 500*l.*; and whether such excess has been at any time to time added to the sinking fund created by the said Act, and paid and applied in like manner as the said annual sum of 2000*l.* is by the said Act directed to be applied; and whether the whole of the sum and sums of money due, as in the Act mentioned, and borrowed under the authority of the Act, has been fully paid and discharged; or whether any what parts or part thereof remain or remains due and unpaid, and to what amount, and why the same have or has not been paid or discharged. And it is further ordered, that the Master do take an account of the costs, charges and expenses, in preparing, drawing, obtaining, and passing the Act, and certify whether the same have been paid and discharged, and when and in what manner; or whether any what parts or part thereof remain or remains due and unpaid, and for what reason. And it is further ordered, that said Master do inquire and certify whether the several additional works and improvements intended to be provided by the said Act have been completed, or whether any and which of such works and improvements have not been completed, and why the same have not been completed, and what remains to be done in respect thereof. And in case any of such works and improvements have not been completed, it is further ordered, that the said Respondents be at liberty to lay before the Master such statement as they may be advised to make respecting the same; and that the said Court do all such things as shall be necessary to carry this Order and judgment into execution; reserving to the said Court the consideration of further directions, and the costs of the suit, until after the Master shall have made his Report.

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IRELAND.

(COURT OF CHANCERY.)

WILLIAM MONTGOMERY *Appella*

JAMES MILES REILLY, and EMILY
GEORGINA SUSANNA, his Wife, JOHN
REILLY, EMILY MARIA CATHERINE
REILLY, JAMES MILES REILLY, the
Younger, JANE HESTER REILLY,
and THEODOSIA HARRIET REILLY,
(Infants, by the said JAMES MILES
REILLY, their Father and next
Friend,) the Honourable GEORGINA
CHARLOTTE EMILIA HANNAH MONT-
GOMERY, Widow, the Reverend ED-
WARD MONTGOMERY, Clerk, ARTHUR
HILL MONTGOMERY, JOHN CHARLES
MONTGOMERY, FRANCIS OCTAVIUS
MONTGOMERY, GEORGE AUGUSTUS
FREDERICK SANDYS MONTGOMERY,
WILLIAM EDMOND REILLY, and the
Right Honourable ROBERT WARD,

Respond

A, being a younger child, becomes entitled, upon the death of her father, by his appointment under a marriage settlement to £1, as a portion charged on lands, and to £500. by his will, charging only his personalty. The other younger children become entitled to similar portions and bequests. The widow was entitled to a jointure under the settlement, and plate and household furniture under the will. B (the eldest son,) enters upon the estate under the limitation of the settlement, and being in possession, carries on a correspondence on the subject of an increase of the jointure of the widow, and the portions of the younger children, with W., a common friend of the family, acting as the agent of B, as well as the widow and younger children. In the course of this correspondence, he proposes, by letter, on certain conditions to increase the portions of his brothers and the jointure of his mother, and gives directions to

of his brothers to pay the increased jointure, and the interest upon the increased portions, which is done accordingly. After the interest had been paid for one year, a treaty of marriage was commenced between A. and C., who applied to the common friend to ascertain the amount of A's fortune, and was informed by him of the correspondence with B., and that he had authority to state, that 4000*l.* was the amount of A's portion, to be secured on B's estate. Upon the faith of this communication, A. and C. intermarried. The interest upon the increased portion was paid by the agent of B., to A. and C., for three years after the marriage. B., in the mean time, had possessed, in consequence of the correspondence, part of the personalty which belonged to the widow and younger children under the will; and had received, without objection, accounts from his agent, including the allowances paid to the widow and to younger children by way of interest upon the increased portions.

Upon a bill by A. and C. to enforce the payment of the increased portion, to which the widow and the other younger children were defendants, and, by their answers, submitted to perform the conditions on which the increase of portion and jointure was proposed.—*Held*, that the effect of the correspondence, with all the circumstances of the case, amounted to an agreement which a Court of Equity ought to enforce.

In the letter on which the husband and wife relied as the agreement in consideration of marriage, B. says:—"I can never be reconciled to the marriage, &c." Then he proceeds to speak of the arrangement between him and his family, and repeats his part of the agreement as to the younger children:—"4000*l.* each to be secured on certain lands; my sister's to be secured to herself for life, then among her children, &c." After stating the conditions for this increase of portion, he concludes:—"This, I think, is an abstract of the agreement, and when put into the form of a deed, if assented to by them, I am ready to execute at any time." And he adds:—"I will not entangle myself with Mr. J. R. (the husband.) If this match goes on, I will neither meddle nor make with it or their settlements."

Whether such a letter, written before the marriage to W., the common friend, and in the circumstances before mentioned, could be enforced as an agreement in consideration of marriage.—*Quære*.

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HUGH MONTGOMERY, being seised in fee of lands in the county of Down, by indentures dated

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the 1st of June, 1782, and executed previously to his intermarriage with the Respondent, Georgina Charlotte Emilia Hannah Montgomery, limited the lands to the use of himself for life, with remainder to his first and other sons in tail; and by the settlement reserved to himself a power of charging the lands, by will or deed, with a sum of 5000*l.*, as a provision for the younger children of the marriage, and a further power of charging 800*l.* for the same purpose.

The marriage took effect in the year 1782, and there were issue of the marriage, living at the death of Hugh Montgomery, eight children; namely, the Appellant, his eldest son and heir at law; the Respondents, Emily G. S., the Reverend Edward Montgomery, Arthur Hill, John Charles, Francis Octavius, and George Augustus Frederick Sandys, and Hugh Bernard (since deceased); of whom Francis Octavius and George Augustus Frederick Sandys were infants at the time when the cause was heard, but Francis Octavius is since of age.

Hugh Montgomery, on the 29th day of September 1801, made his will, and thereby gave to each of his younger children, 1,500*l.* to be paid by his executors, without interest, on the day of their respectively attaining the age of twenty-one years; and, after reciting that his estate of Rosemount stood charged with the sum of 5000*l.* for younger children, he directed that the said sum should be equally divided among them, share and share alike; and, after reciting that he had a power to charge his estate with 800*l.*, he directed that the same should be divided among them, share and share alike; and also that the overplus of the rents and profits of the estates which he held in fee, after paying the interest

of his bond and judgment debts, should be paid to his wife, for the education and maintenance of his younger children, until they should respectively attain their majority, when the interest of the 1,500*l.* should be paid, out of the surplus, to each of them; and he bequeathed all the plate and household furniture he might die possessed of, to his wife, and declared, that it was his intention his personal property should go in discharge of his debts in the first instance, except the bequest to his wife. This will was attested by two witnesses.

In the year 1807, after making his will, Hugh Montgomery purchased lands, the purchase-money for which was 15,750*l.* This having made an alteration in the nature and circumstances of his property, he determined on making a further provision for his younger children by a charge on this lately-purchased estate, and expressed his intention of doing so to his friend, William George Wakely. He died, however, without having fulfilled his intention, on the 31st day of March, 1815, leaving his children before mentioned, and his widow, surviving.

At the time of the death of Hugh Montgomery, the Appellant, and Hugh Bernard, the Respondents Emily G. S., Edward and Arthur Hill, were adults; all the other children were minors.

The Appellant, immediately on the death of his father, entered into possession of the settled and unsettled estates; the former (exclusive of the mansion-house, demesne, and some in the Lough of Strangford) were of the yearly value of about 2,825*l.*; the latter of the yearly value of 2,275*l.*

Shortly after the death of Hugh Montgomery, William George Wakely (who was an intimate friend of the family) communicated to the Appellant

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the intentions of Hugh Montgomery relative to his younger children; and the Appellant on that occasion expressed his determination to carry his father's intention on that subject into effect, and to make up the fortunes of his younger brothers and sister 5,000*l.* each.

This led to a correspondence on the subject between the Appellant and W. G. Wakely, in the course of which letters were written containing passages to the effect following:—

On the 25th July, 1816, Mr. Wakely addressed a letter to the Appellant, who was then in London, in which he says, "Your letter did not reach me as soon as it might: you need make no apology to me for writing freely on your family affairs. Before I have any communication with Grey Abbe^y, let us first completely understand what is to be done and expected; then I shall be able to answer the questions put to me. You expect your mother, brothers and sister, to convey to you their claim on Lord Bangor's money: * do you mean the whole of it present and to come? Suppose this agreed on, how are you to manage with the minors? Your first determination

* The Appellant's mother, the Respondent the Honourable Georgina Charlotte Emilia Hannah Montgomery, was the youngest of the three sisters of Lord Bangor: in the event of his dying intestate, and without issue, (an event which from his advanced age, and having been forty-five years a lunatic, was almost certain) she would, if she survived him, be entitled to a distributive share of his personal property. The amount of that personal property appeared at the time of the examination of witnesses in this cause, to be about 300,000*l.*; and that the share of that sum, to which the Respondent, Georgina Charlotte Emilia Hannah Montgomery would be entitled, was one-sixth, with the chance of being increased by the death of either or both of her two surviving unmarried sisters, to one-fifth or one-fourth.

"800*l.* a year for your mother, and 5,000*l.* each for "younger children." He requests him to be explicit on the subject, and states that the Appellant's mother had expressed her surprise that he had not executed a deed according to his first proposal. He then presses for a final adjustment of the business, and says, "It is natural that your family "should wish the business finally settled as far as "it can be; delay to your sister would be very "prejudicial;" and adds, "you are now the father of your family, and it is well; for God has "blessed you with a clearer understanding than falls "to the lot of most people, which will help you to "settle these matters as nearly as possible in the "way you wish." And he concludes by saying, "I do not mean to write to the North till I hear "from you, as I never understood, from any of the "family, that you had fully explained your wishes "and intentions to any of them. I think I understood you myself; but your answer to those questions will remove all possibility of doubt."

To this the Appellant replied by a letter, dated "London, 29th July, 1816," in which he says "Your kindness emboldens me to make one proposal to you, which I trust will convince you of "my readiness to come to a conclusion, and to do "every thing that is fair and honourable towards my "family. As you are now fully acquainted with "all my feelings and guides of conduct, if you "will be so kind as to desire Arthur to send you "a correct copy of my rent-roll, specifying the "bad or rather insolvent tenants, as also a full "statement of my debts, and any other paper you "may require; if you then will be so kind as to "compare and balance these, making allowance

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"between actual net income and paper rent-roll,
 " *which from experience I feel you are very capa-*
 " *ble of doing, and am sure are aware is no small*
 " *sum, even in the best paid estates; if you will*
 " *trouble yourself with all this, and decide between*
 " *my family and me, I hereby engage to sign what-*
 " *ever deed may be tendered to me, certified to have*
 " *been drawn up under your directions."* He then
 mentions several arrangements he had previously
 in contemplation on the subject, and further adds,
 "my estate is heavily burdened, in addition to the
 "claims of the family; but if an arrangement could
 "be made to give me a certain prospect of future
 "relief, I would not hesitate a moment reducing
 "myself to the most limited income, and at once
 "settling the whole business. The minors cer-
 "tainly offer difficulties; but if the family, who are
 "now of age, sincerely put their shoulder to it, and
 "in short, are determined, both now and hereafter, to
 "act an honest and equitable part, I think it might
 "be arranged by your kind interference. Might not
 "a trust be raised? I am willing to allow my whole
 "estate to be so vested; but I will suggest nothing
 "but leave every thing to your kind arrangement
 "and discretion; again repeating, do you, my dear
 "Sir, with my estate what you please, so as it
 "is kept together; for I well know my father
 "never would submit (*have submitted*) to its dis-
 "memberment;" and he inclosed in this letter
 statement and calculation to assist Mr. Wakely in
 forming an opinion on the subject.

On receiving this letter, Mr. Wakely immediately
 went to Grey Abbey, the family mansion, in order to
 obtain the necessary information; and, having done
 so, he addressed a letter to the Appellant, dated Grey

Abbey, 17th October, 1816, which contains the following passage:—"My dear William, I fear you think
 "by this time, that I have neglected you and your last
 "letter; but I found it impossible to get a sufficiently
 "explicit account, by letter, either of the property,
 "or of what the parties concerned would be at. I
 "have seen the rent-roll, &c. &c. Your mother
 "thinks your father's will valid, with respect to the
 "legacy to her of the furniture, stock, &c.; that they
 "were well worth 2,000*l.*, and more indeed; that
 "therefore you should add 200*l.* a year to her jointure of 600*l.*, making a clear sum for her of 800*l.*
 "a year, without the interference of any one. She
 "intends to take with her, when going, the spoons
 "and forks; nothing more. She most readily and
 "freely offers you as follows; to secure to you your
 "share of Lord B.'s fund, and to add to it 1,500*l.*;
 "both to be paid to you immediately on the death
 "of Lord B. We both think that the young people
 "should secure to you the 1,500*l.* in case your
 "mother dies before Lord B.; this is a material
 "point in your favour. As you mention that your
 "means will not allow you to do what you first intended, it is now proposed that you pay 4,000*l.*
 "(four thousand pounds) to each of the young people, at the death of Lord B.; till that event takes
 "place, to pay them 250*l.* a year each, as they come
 "of age; this to be so settled now, as that each
 "of them, as they come of age, will be legally entitled to it, and be able to make settlements at marriage, or dispose of their shares by will or otherwise; that, on the marriage of your sister, she
 "should be at liberty to call for the 4,000*l.*, if it
 "should be thought expedient to get the money,

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" instead of the 250*l.* a year. You allowed 200*l.*
 " a year for the boys at school, and said you would
 " allow 150*l.* a year to Charles, to manage for him-
 " self: in this there can hardly be any change; as,
 " though 200*l.* a year may be more than Francis and
 " Sandys cost at present, yet hereafter it will not:
 " it is not intended that they shall be any further
 " expence to you, even for pocket money. As
 " far as I can judge, your rent roll amounts to
 " 5,176*l.* 14*s.* 5½*d.* exclusive of the demesne and
 " islands; some of this is uncertain, and you will
 " see on the other side an allowance for it. In the
 " roll the slate quarries are put down as producing
 " 200*l.* a year; this may not be too high an income
 " for them, as I hear they have produced 450*l.*, or
 " nearly, a year, formerly.

" This is a statement of what I have said, and
 " what you are to pay.

" To your mother	-	-	800	0	0	a year.
" 4 of age	-	-	1,000	0	0	
" 3 others	-	-	350	0	0	
" 2 annuities	-	-	132	0	0	
" interest of debt	-	-	1,516	8	9½	
			3,798	8	9½	
" Balance in your favour	-		1,378	5	8	
			5,176	14	5½	

" From this balance take off 178*l.* 5*s.* 8*d.* which, as
 " far as I can see, will fully cover the uncertain
 " part; then you have for yourself 1,200*l.* a year,
 " a good demesne, and a house well furnished. I
 " do not say more than, with good management,
 " you might contrive to live in it. I see that part

‘ of your income is an annuity from Mr. Echlin ; his
 ‘ life ought to be insured for what the annuity cost.”

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This letter appears to have reached the Appellant on the Continent ; and he immediately replied thereto by a letter without date, but which appeared, from the post mark and the testimony of Wakely, to have been received by him on or about the 16th of November, 1816 ; this letter contains the following passages :—“ I do not know how to thank you for the trouble you have taken, and the unexampled kindness of settling the affairs between me and my family. I trust you have the satisfaction to have left them contented. Had your decision been unfavourable to me, you may rest assured I should have been satisfied. All I looked for was strict justice, and from your hands I have received it. As to my mother’s claims, I must make one or two observations. The will as to the chattels has not certainly the defect which renders it invalid as to the freehold estate---admitted : but I deny its being, by any possibility, beneficial to any of the legatees, because the debts, both simple contract and others, that did not affect the freehold, except on a deficit of assets, amounted in total to a much larger sum than the produce of any chattel property of which my father died possessed. On my taking upon myself the responsibility of those debts, surely in common justice, all chattels became mine : in short, without going into particulars, there was an arrear of interest, on one sum alone, of above 3000*l.*, and different smaller ones, amounting to at least another thousand ; to which add book debts and servant’s wages : 5000*l.* would not be beyond the total, but in my opinion considerably within it. As that would exceed all proceeds of assets, I need

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“ not say that, had I put them to the will, and con-
 “ fined them to take under it, I could have added all
 “ bond debts upon which no judgment was entered,
 “ and not a penny of which was I liable to, as long
 “ as there was a pin of chattels. Upon those grounds
 “ I deny my mother's claims, as a right ; for which
 “ reason, and that they may all fairly understand
 “ that what they take I might have withheld, I shall
 “ certainly make no objection to my mother having
 “ the use of the spoons and forks you mention, or
 “ indeed any remainder of the plate she may choose
 “ for her life, reversion to me or my heirs. The
 “ value is but small ; of the reversionary of course
 “ nothing : but there are limits at which I must stop
 “ in justice to myself. There are stories come to my
 “ ears in London about Emily ; indeed so openly talk-
 “ ed about, that I was asked if it was not actually
 “ the case ; but as you say nothing of it, though her
 “ never having written to me since May last, makes
 “ me very suspicious, I would fain hope it is not
 “ true ; namely, that she is going to be married to
 “ James Reilly. She long knows my opinion ; an
 “ opinion drawn from me by herself ; and, if she is
 “ going to act contrary to that opinion which she
 “ professed to me she would be guided by, in short
 “ if she marries J. R., I can never consider her other-
 “ wise than having acted most deceitfully towards
 “ me : it will be a marriage I can never acknowledge ;
 “ she must bid farewell to Grey Abbey for ever. I
 “ do not pretend to any right of interference ; but as
 “ she has an opinion in writing of mine, not expres-
 “ ed in the gentlest terms, I cannot forgive the de-
 “ ceit of drawing out an opinion by pretending to
 “ hold the same, when she must have been, if this
 “ report is true, which I fear much it is, mentally

determined, the first opportunity, to act contrary to it. As to my not being able to live on 1200*l.* a year, I trust I shall always be able to reduce my expenses to my income, when all other control over my purse is removed. 200*l.* a year is certainly a high average for the quarries; I am not aware of their ever netting 450*l.* I never will myself count them in my rent roll, considering them as only making up for and equalising the bad or waste parts of the demesne; they never were averaged at more than 200*l.* at their best times, and last year were a losing concern. I should like to know what the bogs were put at; they never realised their calculated average, but it is a matter of no essential consequence."

In the autumn of 1816, a treaty of marriage was entered into between the Respondents James and Emily. In a letter of the Appellant's to the Respondent James, dated the 24th December, 1816, he declares he will never recognise the Respondent James as a brother, but does not intimate an intention of withholding the portion he designed for his sister.

On the 6th of January, 1817, the Appellant addressed a letter to Wakely, in which, alluding to the expected intermarriage of the Respondents James and Emily, he says, "A few posts ago I received your kind letter of the 10th of December, and would have answered it immediately, but for the unsettled state I was and am still in, about this to me horrible match of my sister's; it is in vain to try, I can never be reconciled to it, or induced in any manner to receive the gentleman as my brother." And after stating that he was himself about to be married, he proceeds as follows: "I am thus explicit, because you have at all

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“ times taken such a kind interest in all the affairs of
 “ our family ; and to show to you that my marriage
 “ will not in any manner affect the arrangement you
 “ have so kindly undertaken between me and my
 “ family, the manner of putting which into execu-
 “ tion, to prevent mistakes, I shall now repeat ;
 “ 4000*l.* each to be secured upon certain lands, prin-
 “ cipal not payable till after the death of Lord Ban-
 “ gor ; interest to commence to each on their coming
 “ of age ; my brothers’ to be settled on marriage, in
 “ the manner most agreeable to the parties concern-
 “ ed ; my sister’s to be secured, first to herself for
 “ life, then share and share alike among her chil-
 “ dren ; but in all cases, in failure of issue, reversion
 “ to my estate. My mother to have 800*l.* a year,
 “ secured to her for life, and the use of the plate
 “ which she has chosen for her life : also I am to be
 “ secured my share of Lord Bangor’s dividend by my
 “ mother, as also 1500*l.* over and above that sum, for
 “ the payment of which latter sum my brothers and
 “ sister are to become bound, as my mother might
 “ die before Lord Bangor : and, to sum up all, they
 “ are to assign to me all title or claim which they
 “ may have, or fancy they have, upon my father’s
 “ chattels, or the estate, either in virtue of his will,
 “ marriage settlement, or any other claim whatsoever.
 “ This, I think, is an abstract of the agreement ; and
 “ when put into the form of a deed, if assented to by
 “ them, I am willing and ready to execute it at any
 “ time. I will not entangle myself with Mr. James
 “ Reilly ; if this marriage goes on, I will neither
 “ meddle nor make with it or their settlements.
 “ What Emily gets from me, she shall take under
 “ the same deed as the rest of my family ; it shall be
 “ therein strictly settled, and Mr. J. R. or any other

“ person she may choose to marry, shall have nothing
 “ to say to it.

To this Mr. Wakely replied by letter bearing
 date the 25th of January, 1817, in which he
 endeavours to prevail on the Appellant not to insist
 upon having his brother's portions settled as inti-
 mated in his letter of the 6th January. On the
 subject of the marriage between the Respondents,
 (J. and E. Reilly) he writes thus: “ The writings are
 “ preparing by Keown, relative to your sister, and
 “ James R. ; I communicated your decision as men-
 “ tioned in your's of the 6th, to your mother, as to
 “ what you would give Emily, and the terms, &c. Reil-
 “ ly settles 1,000*l.* (one thousand pounds) in money on
 “ your sister, in case she survives him, and a jointure
 “ of 260*l.* a year ; her own of course is to be as you
 “ determined.” And on the subject of his brothers,
 he proceeds thus: “ But as to your brothers, this
 “ alteration of yours is a very serious one, and
 “ probably was not in contemplation when you
 “ wrote your last of the 6th instant. If their for-
 “ tunes are only to be paid on their marriage, and
 “ to revert to your estate in case of failure of issue,
 “ what are they but poor annuitants? how are they
 “ to advance themselves, on any occurrence? they
 “ could not be possibly put into a more awkward
 “ predicament. The plan I sent you from Grey A.,
 “ did not contain such an arrangement, your consent
 “ to which I communicated to the parties concerned.
 “ Put yourself, by supposition, into the situation of
 “ a younger brother, similarly circumstanced as
 “ yours will be, if they are to be annuitants, and
 “ you may easily guess what must be the sen-
 “ sations of Hugh, and Edward, and Arthur, on

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“hearing that so very great a change is to take place. I took particular pains that the plan I sent from Grey A., should be clear, but I really do not think you meant this when you wrote last; at all events it is but right that you should immediately explain yourself. Whatever your brothers are to have they should have the power over, when they come of age. Consider the matter, and am certain you will decide as you ought. I am neither afraid of your head or heart.”

To this the Appellant replied by a letter dated the 19th of March following, by which he relinquishes the purpose of having his brothers' portions brought into strict settlement, but insists on it as to his sister's. His words are, “As you say you cannot see the business in the same light with me, I most willingly consent to your construction of the agreement, as far as relates to my brothers; but as to my sister, I cannot bring myself to alter one tittle; she must abide the consequences of her unkind conduct towards me.”

At the commencement of the marriage treaty between the Respondents James and Emily Reilly, the Respondent James applied to Mr. Wakely, as the person acquainted with the particulars and in the confidence of the family, who informed him that the fortune of the Respondent Emily was not 5,000*l.*, but only 4,000*l.*, to be settled on her brother's estate; that her brother had promised by letter to execute a deed to secure that sum, and that he had authority to say so, and he read to the Respondent James extracts from his correspondence with the Appellant. In the course of the treaty it was suggested by Mr. Wakely that

as the Appellant wished to have the 4000*l.* charged on particular lands, not then ascertained, it would be better not to mention the same in the Respondent's marriage settlement.

In the instructions drawn under the direction of Mr. Wakely, to be laid before counsel, is contained the following paragraph: "Miss Montgomery's fortune, it is presumed, need not be mentioned in this settlement; it is 4,000*l.* charged by her brother, or rather to be charged on his estate for her life, with remainder to her issue, failing which, to merge into Mr. Montgomery's estate."

These instructions were sent to counsel, and according to the desire expressed by the Appellant, to reserve the right of ascertaining on what part of his estate the portion should be charged, and the wish expressed in his letter of the 6th of January, 1817, that the limitations to which that sum was to be subject, should be made in the deed by which such charge was to be made, it was left out of the settlement, which contained only the limitations of the property of the Respondent James. This settlement was executed on the 4th of February 1817 and thereby an annuity, by way of jointure, of 260*l.* a year, during life, in case the wife survived her intended husband, and a further sum of 1,000*l.* to be paid immediately on his death, was provided for her, with a covenant to secure to her and her executors, without the interference of her husband, any sum she might become entitled to by the death of Lord Bangor.

The Respondents, James and Emily Reilly, were married on the 4th day of February, 1817.

Before the Appellant went abroad in the year

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1816, he gave written instructions to his brother and agent, Arthur Hill Montgomery, directing him to pay to his mother 1,000*l.* a year, to the Respondents Emily, Hugh, and Edward, 250*l.* a year, and to retain to himself 300*l.* a year. These annual sums were paid, by Arthur Hill Montgomery, to the several persons mentioned in the instructions (including the sum of 250*l.* paid to the Respondents James and Emily Reilly, until the year 1820) and still continue to be paid to all the parties now living, mentioned in the instructions, excepting the 250*l.* per annum to the Respondents James and Emily.

The Appellant on the other hand, according to the agreement, took the stock, plate, household furniture, books, pictures, wine and money at Grey Abbey; was permitted to retain property which his mother, brothers, and sister, were entitled to under the marriage settlement and will of their father; and to take for his own benefit, the personal property of Hugh Bernard Montgomery, who died unmarried, intestate, and without issue, on the 1st of May, 1817. The Appellant was also permitted to retain for himself his brother Hugh's share of the younger children's fortune, charged on his estate.

During the absence of the Appellant on the Continent, his agent, Arthur Hill Montgomery, furnished him with accounts; and, in the year 1820, when the Appellant returned to Ireland, he investigated the state of his affairs, and settled all his accounts with his agent, Arthur Hill Montgomery; in all which accounts, as furnished from time to time, the annual sums paid to his mother, brothers and

sister, under the arrangement, were credited to the agent without objection. But, on the 10th August, in the same year, the Appellant wrote to the Respondent a letter, of which the following is an extract : " From a statement of the payments which have been made on my account at different times to your wife, since my father's death, they appear to me to exceed the total amount of her claim upon my estate: the sum, which appears to be paid up to 1820, is 1,071*l.* 10*s.* while her share of 5,000*l.* settled as younger children's portions, together with interest, as directed by my father's marriage settlement, at five *per cent.*, amounts to 883*l.* less a few shillings. As, therefore, it is my anxious endeavour to exonerate my estate as soon as possible from all charges, I have now to request that, as soon as convenient, there may be transmitted to me your joint receipt, in full of all claims upon my estate, together with an engagement that, should counsel, at any future period, advise any further security or form of discharge as necessary, you will satisfy it without further expense to me. Until the above-mentioned receipt, with its accompanying undertaking, be regularly signed and transmitted to me, I must withdraw any allowance which I may be inclined to give my sister, and shall give directions accordingly;" and accordingly he gave directions to his agent not to make any further payment to the Respondent.

The Respondent having written to the Appellant to remonstrate, and state that he was advised not to give such a discharge as the Appellant required; and having called upon the Appellant to perform his promise, received another letter from the

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Appellant, dated Florence, October 2, 1821, in which he says: "It is merely necessary to premise, that a greater insult cannot be attempted than the accusation of a desire to evade a promise. I have invariably purposed to charge my estate with 4,000*l.* for each individual of my father's younger family; but this sum not to be in addition to any other claim by settlement or otherwise, which they might have against that estate, but it is to be released from all such charges. That 4,000 *l.* is a sum more than fourfold their legal right, I believe not one of them will pretend to deny; and that it is twice what my father intended for them, I believe they are all equally aware; and it is highly probable that you, long ere this, are conscious of the fact. Thus I cannot but consider that the interference of a court of Equity, so far from being to my injury, would be my ultimate resource in case of subtile hostility; though, indeed, I consider the remedy almost as bad as the disease, not being silly enough to suppose the expense of law to be all upon one side: finally, I do not see how, either in law or equity, I can be prevented from arranging the detail of my own free gift."

In July, 1822, the Respondents James and Emily Reilly filed, in the Court of Chancery in Ireland, the original bill in this cause, against the Appellant William Montgomery, and the Respondents George Charlotte Emilia Hannah Montgomery, the Rev. Edward Montgomery, Arthur Hill Montgomery, John Charles Montgomery, Francis Octavius Montgomery, George Augustus Frederick Sandys Montgomery, William Edmond Reilly, and the Right Honourable Robert Ward, (the last named Respondent having

been made a defendant pursuant to an order dated 18th November, 1822); stating in substance the facts before mentioned, and particularly the arrangement by which the Appellant was to have given each of the younger children 5000*l.*, but admitting that sum to have been afterwards reduced to 4000*l.*, and stating that, as the sum upon the faith of which the marriage was contracted.

The original bill prayed, that the Appellant might be compelled, by the decree of the Court, specifically to perform his agreement with the Respondents James and Emily; and that it might be referred to one of the Masters of the Court to approve of a proper deed to be executed by the Appellant, to charge his estate with the sum of 5000*l.*, or that the Appellant might be compelled to pay the same, with all interest due thereon, the Respondents James and Emily being willing, and thereby offering, specifically to perform the said agreement on his or their part; and that on the Appellant's paying the sum of 5000*l.*, with all interest due on the same, or on his executing a deed charging his estates with the same, they were ready to execute a proper release and discharge to exonerate his estates of and from all and all manner of claims and demands, under or by virtue of the marriage settlement, or under the will, or in anywise whatsoever, except by the charge; or that, in case the Court should be of opinion that the Respondents James and Emily were not entitled to such relief, then that it might be referred to one of the Masters of the Court to approve of a proper deed, to be executed by the Appellant, to charge his estates with the sum of 4000*l.*, and that the Appellant might be compelled to pay the same, with all interest

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due thereon; the Respondents James and Emily being willing, and thereby offering, specifically to perform the last-mentioned agreement on his and their part; and that, on the Appellant's paying the sum of 4000*l.*, with all interest due on the same they were ready and willing to execute a proper release and discharge to exonerate his estate from a*l.* and all manner of claims and demands, under or by virtue of the will, or in any way whatsoever, except such charge: or in case the Court should be of opinion that the Respondents James and Emily were not entitled to such relief as last aforesaid, then that the trusts of the marriage settlement, so far as related to raising the portions of the younger children, might be carried into execution, and performed, (the Respondent James being ready and willing, and thereby offering, as one of the executors of the surviving trustee, to do any act that might be deemed necessary on his part for that purpose), and that the estates in the marriage settlement, or a competent part thereof, might be sold; and that all proper parties might join in such sale; and in order thereto, that the marriage settlement, and the title-deeds and writings relating to the estates might be produced, and might be brought in and lodged in the Bank of Ireland, together with all letters, as well from the Respondent James, as from William George Wakely, addressed to and received by the Appellant on the subject: and that the will of Hugh Montgomery might be established, and the trusts thereof performed; and that an account might be taken, by and under the decree of the Court, of the legacy due to the Respondents James and Emily, and of their distributive share of the intestate Hugh Bernard Mont-

onal estate, and of all debts which were
 ator, and the intestate Hugh Bernard
 time of their respective death or
 all remained unpaid ; and that an
 taken also of the testator's and of the
 sonal estate and effects, received by or
 e of the Appellant, and that the personal
 and effects of the testator and of the intestate
 h Bernard Montgomery might be applied in
 ment of their debts, in a due course of adminis-
 on ; and that as much of the testator's personal
 be as should remain after payment of the tes-
 r's debts, might be applied in or towards the
 ment of the said legacy so due to the Respondents
 es and Emily as aforesaid ; and in case it should
 ear that the whole or any part of the said testator's
 sonal estate had been or should be exhausted or
 lied in or towards the payment of his specialty
 ts, and that the residue thereof was not sufficient
 answer the simple contract debts and legacies of
 testator, then that it might be declared, that the
 pondents James and Emily, ought to stand in the
 be of the testator's creditors, by specialty, who had
 l, or should have a satisfaction for their debts, out
 the personal estate, and might have satisfaction
 of the real estate, for so much of their legacy as
 personal estate, after payment of his simple con-
 ct creditors, should be deficient to answer, by rea-
 r of the same having been exhausted or applied in
 towards the payment of his specialty debts ; and
 t the same might be decreed accordingly ; and that
 real estates, so descended unto the Appellant, as
 r at law of the testator, might be sold or mort-
 ged for that purpose ; and that all proper parties
 ght be decreed to join in such sale or mortgage ;

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and that the money to arise from such sale or mortgage, might be paid to the Respondents James and Emily accordingly; and that the bequest of the sum of 800*l.*, amongst the younger children of the testator, might be declared a good and sufficient execution of the power vested in the testator by the marriage settlement, to charge his estates with a sum not exceeding 800*l.*; and that the same might be raised and applied accordingly; and that a proper person might be appointed by and under the decree of the Court, to receive the rents, issues and profits of the estates of the Appellant, and to apply the same in keeping down the interest of the several incumbrances, affecting the estates or otherwise, as the Court should direct; and that the Appellant might, before he answered the bill, view in the hands of the Plaintiff's six Clerk or Commissioner, according to their mode of answering, the letters, bearing date the 10th of August, 1820, addressed to James Reilly, esquire, and signed "Wm. Montgomery"; and the letter, bearing date the 2d October, 1821, addressed to James Reilly, esquire, 62 Blessington-street, and signed "Wm. Montgomery"; and also two other letters, bearing date respectively, the 10th May, 1821, and the 27th March, 1822, and addressed to James Reilly, esquire, Blessington-street aforesaid, to be by him produced, and that he indorse his name thereon, and set forth in his answer to the bill, of whose hand-writing they, each of them and every part of them are, to the best of his knowledge and belief.

The Appellant, by his answer to this bill, which was put in on the 14th day of April, 1823, and by his further answer, which was put in on or about the 10th of June, 1823, in consequence of exceptions

taken by the Respondents James and Emily to the former answer of the Appellant admitted frequent conversations with Mr. Wakely, on the subject of his family affairs, but he denied the agreement stated, and relied on in the bill ; but although he denied that any agreement ever existed, he admitted, that, shortly after his father's death, he expressed, in a casual conversation with Mr. Wakely, an intention of increasing his sister's and younger brother's fortunes, but that he was then ignorant of the state of his affairs, and of the extent of the incumbrances affecting his estates. He admitted the directions given to his brother Arthur, but represented them as payments by way of voluntary annuity, to his mother, brothers, and sister ; and denied that it was to be paid as interest, or in consequence of any agreement.

He said, that he wrote several letters to Mr. Wakely, in order to learn, through him, the exact state of his affairs, and the particulars of Lord Bangor's property ; that he received that information from Mr. Wakely by letter, dated the 17th of October, 1816, stating his rent roll at 5,000*l.*, the interest of the debts on his estates at 1,500*l.*, and other particulars in answer to his inquiries ; that Mr. Wakely, in this letter, proposed to Appellant, to increase his mother's fortune to 800*l.* a year, and to give his sister and each of his brothers 4,000*l.*, payable at Lord Bangor's death ; and in the mean time to pay them each 250*l.* a year.

The Appellant admitted that, with reference to Mr. Wakely's proposal, he wrote to Mr. Wakely a letter dated the 6th January, 1817, in which he declared that the sum he intended for his sister should be secured to herself, first for life, then share and share alike for the children ; and the principal not

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to be payable till Lord Bangor's death ; but he required to be secured his share of Lord Bangor's property by his mother, with other conditions appearing by the letter : he denied that Wakely had any authority to make any arrangement on his part, as to the marriage settlement, but admitted a correspondence with the Respondent James, on the subject of his marriage. He insisted that Wakely had no authority from him to interfere in the marriage settlement.

The Appellant, by his answer, further insisted that his mother and the several other members of his family were bound on their parts to have performed and fulfilled the terms contained in Wakely's letter of October, 1816, and the Appellant's letter of the sixth of January, 1817, if they required or expected from the Appellant such settlement as was proposed by those letters ; yet they had never done so, nor offered to do so ; and, on the contrary, both his mother and the Respondents James and Emily, had refused to do so. In his further answer to exceptions taken by the Respondents, the Appellant insisted that, as Wakely could not by any letter of his, bind the Appellant's family to any engagement on their parts, nor did he by any of his letters pretend to do so ; and as none of Appellant's family, by letter or otherwise, ever entered into any written or even verbal engagement or agreement with the Appellant respecting the subject of his correspondence with Wakely, or respecting any family arrangement whatsoever, the Appellant was not bound by any letters written by him to Wakely, which were voluntary, private, and confidential, and not intended for exposure, and did not authorise Wakely, by any declaration of his, to bind the Appellant.

The Appellant, by his answer, further said that, although he considered himself discharged from any offer he had made, yet that in June, 1822, he had sent to and informed the Respondent, James, that he was ready, then, to fulfil the terms of his letter of the 6th of January, 1817; and, notwithstanding the bill filed by Respondent, did, to purchase his peace, about the 29th of October, 1822, cause a deed to be prepared, which he signed and tendered to Respondent for execution, agreeing to pay to trustees 4,000*l.* to the uses of Respondent's marriage settlement; but that Respondent refused to accept of or execute the same; whereupon the deed was cancelled.

The Appellant subjoined to his answer schedules, setting forth the specialty and simple contract debts of his father, and his personal estate.

The several other defendants put in answers agreeing to fulfil on their parts the terms of the arrangement as to Lord Bangor's property, and in all other respects.

The Respondents James and Emily afterwards filed an Amended Bill on the 8th of November, 1823, noticing the several objections raised by the Appellant, especially that in respect to the arrangement being conditional, and founded on the stipulation that the Appellant should be secured as to the share of Lord Bangor's property; and, by their amended Bill, the Respondents stated, that all the members of the family were ready to make good their part of the arrangement; and referred to their answers offering to do so.*

* The pleadings are not set forth in the Appendix to either case, and it does not appear from the statements in the body of the printed cases, that the Appellant's letter of the 6th of January 1817, was distinctly stated, as the ground of the plaintiff's equity.

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By this Bill also some further letters of the Appellant were put in issue, so as to complete the chain of correspondence, from which the agreement was to be collected. With respect to the allegation that the communication to Mr. Wakely was merely intended as a private and confidential one, the amended Bill referred to some of the Appellant's letters, in which the Appellant states his reason for wishing to be explicit, "to prevent mistakes," and stipulates for the 4,000*l.* being settled.

The Appellant filed his answer to this amended bill on the 12th of February, 1824, in which he stated that any letters written by him, either to his brother or Wakely, were written in contemplation of a family arrangement which never took place, nor was definitively settled; and he insisted that such a correspondence could not form any ground of relief for the Plaintiffs in their present suit; and that he was not bound to comply with the terms of any letter written by him to Wakely, in answer to his letter of the 17th October, 1816, or otherwise. He insisted further, that the Plaintiffs did not, by their original or amended bill, found any part of their equity upon that letter; and that the letter amounted only to a proposal for a family arrangement which could not be carried into effect, except by all the members of the family ratifying it, which they never did; but on the contrary some of them, and particularly his mother, refused to do so.

The Respondents replied to the answers of the Appellant to the original and amended Bill; and the cause being at issue, and evidence having been produced on both sides;—the cause came on to be heard, on Wednesday the 30th of June, 1824; and to be further heard on the 2d, 5th and 6th of July, 1824;

n which last day, it having been urged in argument, by the counsel of the Appellant, that the infant children of the Respondents James and Emily ought to be parties to the suit, the Lord Chancellor ordered, that, on the Respondents, James and Emily, undertaking to procure the agreement in the pleadings mentioned, to be duly stamped, and to pay the necessary duties and expenses consequent thereon, the cause should stand over, with liberty to the Respondents James and Emily to amend, by making the minor children of the Respondents James and Emily, parties in the cause, as the Respondents James and Emily should be advised; and on the 14th of the same month, the Respondents James and Emily, having procured the agreement to be duly stamped, and having paid the duties thereon, amended their Bill by making the infant Respondents John Reilly, Emily Maria Catherine Reilly, Jane Lester Reilly, James Miles Reilly the younger, and Theodosia Harriet Reilly, the minor children of the Respondents James and Emily, by the Respondent James Miles Reilly, their father and next friend, parties, Plaintiffs.

By a further order, made in the cause, bearing date on the 8th day of July 1824, it was referred to Thomas Ball, one of the Masters of the Court, to enquire and report whether it would be for the benefit of the minors that the cause should be heard as to the minors, upon the pleadings and proofs already made, as if they had been parties in the cause from the beginning; and that, if the Master should report that it would be for their benefit, then the cause should come on to be heard during the then present sittings. By a report, bearing date the 9th of July 1824, the Master reported that it

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would be for the benefit of the minors that the cause should be heard, as to the minors, upon the pleadings and proofs already made, as if they had been parties in the cause from the beginning ; and the cause came on accordingly to be heard on the 12th of July, and stood over until the 19th of the same month, on which last mentioned day the following Decree was pronounced, viz :—

“ Whereupon, the Plaintiffs, James Miles Reilly
“ and Emily Georgina Susanna Reilly, otherwise
“ Montgomery, his wife, undertaking to release the
“ estates real and personal of the Reverend Hugh
“ Montgomery, clerk, deceased, in the pleadings
“ in this cause named, from all title or claim under
“ the will of the Reverend Hugh Montgomery,
“ deceased, or by virtue of the marriage settlement
“ of the Reverend Hugh Montgomery, or otherwise;
“ and as to the sum of 1,500*l.* in the pleadings men-
“ tioned ; and the Plaintiffs also agreeing to secure
“ the same to the Defendant William Montgomery,
“ in the event of Georgina Charlotte Emilia Hannah
“ Montgomery, the mother of the Defendant Wil-
“ liam Montgomery, dying in the life time of the
“ Right Honourable, Nicholas, Lord Viscount Bar-
“ gor, a lunatic, according to the terms of the agree-
“ ment in the pleadings mentioned ; and the De-
“ fendants, the Honourable Georgina Charlotte Emi-
“ lia Hannah Montgomery, widow, Edward Mont-
“ gomery, clerk, Arthur Hill Montgomery and John
“ Charles Montgomery, esquires, being willing and
“ offering to perform the agreement mentioned on
“ their respective parts ; it is decreed, that the Plaintiffs
“ are entitled to a specific performance of the agree-
“ ment as to the principal sum of 4000*l.* in the plead-
“ ings mentioned to be raised after the decease of

“ Nicholas Lord Viscount Bangor, and the interest
 “ thereof payable during the life of Nicholas, Lord
 “ Viscount Bangor: and it is further ordered, &c.
 “ that it be, &c. referred to Thomas Ball, one of the
 “ Masters of this honourable court, to settle and ap-
 “ prove of a proper deed or deeds to be executed by
 “ and between the Plaintiffs and Defendants for car-
 “ rying the agreement into execution, according to
 “ the true intent and meaning thereof: and it is fur-
 “ ther ordered, that the Master do audit and state an
 “ account of the sum due to the Plaintiff Emily Reilly
 “ on foot of the interest on the sum of 4000*l.*: and
 “ it is further, &c. referred to the Master to in-
 “ quire and report whether it would be for the
 “ benefit of the minor defendants Francis Octavius
 “ Montgomery, and George Augustus Frederick
 “ Sandys Montgomery, the younger brothers of
 “ William Montgomery, that the agreement as to
 “ them should be carried into execution; and if the
 “ Master shall be of opinion that it would be for
 “ the benefit of the minor defendants, then, &c.
 “ the minors are hereby also decreed entitled
 “ to the benefit of the agreement, and bound by the
 “ terms thereof; and thereupon it is referred to the
 “ Master to settle a proper deed or deeds to carry
 “ the agreement into execution, so far as relates to
 “ the minors; such deed to be executed by them on
 “ their attaining their respective ages of twenty-
 “ one years: and it is further ordered, adjudged,
 “ and decreed, that the Master do make a separate
 “ report upon the last-mentioned reference respect-
 “ ing the minor Defendants before the passing of
 “ this decree.”

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Against this decree the appeal was presented.

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For the Appellant :—*The Attorney General and Mr. Shadwell.*

The order to amend and the decree can only be founded on the letter of the 6th of January, 1817, for it is only under that letter that the minor plaintiffs could have any interest in the subject matter of the suit. But that letter forms no part of the case made by the bill—on the contrary, the case made by the Bill is in contradiction to it; and on the Bill as now amended, the minor Plaintiffs appear to have no interest in the subject matter of the suit.

The decree gives the plaintiffs a relief not prayed by the Bill, on an agreement not stated in the Bill, but on a letter stated by the answer of the Defendant, and materially differing from the agreement stated in the Bill, and by which letter the defendant insisted he was not bound; and it is against the principles and practice of a Court of Equity to decree against a defendant upon an agreement stated by him, differing from an agreement stated by a plaintiff, unless the defendant submits to perform the same.

Even if the Plaintiffs had by their Bill founded their case on the letter of the 6th of January, 1817, and that it could amount to an agreement under any circumstances, they should have shewn by their Bill that it was assented to by the Defendant's family, and have offered to perform the terms of it on their parts.

The decree assumes, contrary to the fact, that the Defendants Georgina, Edward, Arthur, and John Charles Montgomery, had, *by their answers*, offered to perform the agreement decreed. Whereas, they did not, by their answers, mention or allude to it, or offer to perform any agreement but the agreement

d in the Bill, and which agreement is negatived, all by the evidence as by the decree.

Wakely, who wrote the letter of the 17th of October, 1816, and to whom the letter of the 6th of January, 1817, was addressed, had no authority to enter into a contract for the Appellant's family, nor did he profess to do so.

The letter of the 6th of January, 1817, was on the face of it only a proposal, and conditional in its nature, amounting only to a treaty which never was completed.

That letter was voluntary, and without consideration, and as such ought not to be enforced in a Court of Equity.

The Appellant never promised, nor authorised any person to promise or represent, that he would give his sister, the Respondent Emily, 4000*l.* or any other sum, on her marriage with the Respondent, James Reilly.

The Respondents, James Reilly, and Emily, his wife, have not shown that their marriage was contracted on the faith of any promise or representation made by the Appellant in writing, or by any person lawfully authorised by him to do so.

For the Respondents:—*Mr. Horne* and *Mr. Sugden*. The agreement stated in the correspondence between the Appellant and Mr. Wakely, is sufficiently clear and definite in its terms to be carried into effect by a Court of Equity.

This is not merely a voluntary agreement, but a valuable consideration. The Appellant was to give in exchange, first, the sum of 5,800*l.*, bequeathed by the will and settlement of his father; secondly, furniture, plate, stock, crop, books, pictures, and all the moveables at the mansion-house of

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Grey Abbey, together with arrears of rent, money in the house and bank, and debts due, amounting altogether, by the Appellant's admission, to a sum of 8,167*l.* 7*s.* 10*d.* actually received: and although the Appellant's father owed debts, charged by judgment and specialty, to the amount of 25,000*l.* or thereabouts, the creditors ought to resort to the fee simple estate, which descended to the Appellant, and the assets would be marshalled in favour of Mrs. Montgomery, who was specific legatee of the plate and furniture; and, thirdly, 1,500*l.* more than an equal share of the fund expectant on the death of Lord Bangor, is secured to the Appellant; the present amount of this (if Lord Bangor were now dead) would be to the Appellant upward of 8,642*l.*, with a reasonable prospect of being further increased to 10,071*l.* by the death of either of Lord Bangor's unmarried sisters, in the lifetime of the said Lord Bangor; and to the sum of 12,214*l.* in the event of the death of both of the sisters, during the joint lives of Lord Bangor and Mrs. Montgomery, together with the chance of being further increased by the death of any of Mrs. Montgomery's children, in her life time; and, as a further advantage, in case of the Appellant's sister dying without issue, the sum charged was to merge in his estate. This appears to be not only a valuable, but an adequate consideration for the sum to be charged by the Appellant on his estates. At the time of the agreement, there were four of the younger children adults; the sum to be charged certainly on the Appellant's estate, therefore, must be at least 16,000*l.*, 4,000*l.* of which might revert to him; and whether it should ever exceed that sum, must depend upon whether the minor brothers of the Appellant should live to attain the age of twenty-one years.

There is, therefore, in this case, such consideration as would entitle the Respondent, Emily, to have the agreement carried into specific execution, against the Appellant, even if she were still unmarried, more particularly when the relative situation of the parties is considered, the Appellant having been at the time *in loco parentis* to his younger brothers and sister; and, as it is said, the court does not weigh in very nice scales the consideration for family agreements, if they be fair and reasonable.

Even supposing this agreement to have been originally purely voluntary, the marriage, which has been contracted on the faith of it, forms a consideration of the highest kind in the contemplation of a court of Equity.* The parties would not have entered themselves in this situation, if they had not calculated on the wife's portion of 4,000*l.* as part of a provision for the family; and it is in evidence that Mrs. Montgomery would not have given her assent to this marriage, if she had not considered that the Respondent Emily was to have a fortune of 100*l.*, charged by her brother on his estate, and which, by his letter, he insisted upon being made the subject of strict settlement, so as to secure it as a provision for her and her children.

The agreement has been in part performed: the Appellant has been permitted to retain the household furniture, plate, linen, books, &c. in the manor-house of Grey Abbey. Since his father's death, he has never been called upon for any account of his father's, brother's, or sister's claims under the will or settlement of his father; he has never been called

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on for any account of the personal fortune of his brother, Captain Hugh Bernard Montgomery, who died intestate in the year 1817; and, on the other hand, he has paid his mother and brothers, the annual sums stipulated by the agreement, and continues to pay them to the present day; and he, in like manner paid the Respondent Emily, under this agreement, until the year 1820. The Appellant does indeed allege (for the first time in his letter to the Respondent James, of the 10th August 1820), that the payment of 250*l.* *per annum* to the Respondent, was in discharge of the claim which he alleges they had under his father's will and settlement; but it would be a fraud in the Appellant to permit the Respondents to act under the delusive impression that they were receiving an annual income, without diminishing the principal sum, or to anticipate the capital of the Respondent Emily's fortune, without apprising them that they were doing so. The Appellant cannot be allowed to put that construction upon his own acts, which would impute fraud to himself; and the payment of 250*l.* *per annum* to the Respondents James and Emily, must be considered as in part performance and execution of the agreement.

Here is no defect of mutuality, for the receipt of the 250*l.* a year by the Respondents bound them to the performance of the agreement.

At the conclusion of the argument, the Lord Chancellor said:

There might be two questions, 1. Is it maintainable as an agreement in consideration of marriage? 2. Is it maintainable as a family arrangement? But a preliminary question is, whether there is any final decree to appeal from? The decree requires that

there should be a separate report from the Master as to the interest of the minors before the decree should pass. If there has not been any such report, (and none is stated or suggested) how can the decree be final? Suppose the Master should report that the settlement is not for the benefit of the infants, is the decree to be operative? It must be considered whether the cause should not stand over till the report has been made. The Chancellor of Ireland may then determine whether the decree should pass. There cannot be an appeal from a decree which is conditional, and has not finally passed. The first thing to be done is to make out that there is a decree.

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The *Earl of Eldon*.—This is a case in which it is impossible for me to state to your Lordships that there is not very considerable difficulty; a difficulty which it would not be very easy to overcome, if your Lordships were to look at it as a case in which the question arose, and on which it must be determined alone, on what is called the marriage agreement, considering what the law of the land requires as evidence to give effect to such an agreement, and looking to the different cases in which different opinions have been given: some in which it has been said that there must be writing to make out such an agreement antecedently to the marriage, and other cases in which it has been thought that a parol promise followed by marriage and written evidence after the marriage, was sufficient.* But I think your Lordships may consider the case, with a view to all the circumstances, not merely what took place previous to the marriage, but whether, with reference to all which took

11th May.

* See *Randall v. Morgan*, 12 Ves. 67, and the cases there cited.
1 Foul. Tr. Eq. 342.

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place as to the effect of the bargain, and all which has taken place between these parties, this agreement is an agreement which ought to be carried into execution; and upon the best judgment I can form upon this, which I at the same time acknowledge to be a very difficult case, it appears to me that you may be safely advised to affirm the judgment.

That judgment ought, in my opinion, to be affirmed with some costs; but, under all the circumstances, it does not appear to me that it should be with the infliction of all the costs which have been incurred at your Lordships' bar, and my motion will therefore be, that the judgment should be affirmed with 100*l.* costs.

Judgment affirmed, with 100*l.* costs.

ENGLAND.

(COURT OF EXCHEQUER.)

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and another.

JOHN MORGAN and BRIDGET his }
Wife, and ELIZABETH MORRIS, } *Appellants.*
Widow, - - - - - }

THOMAS EDWARDS and THOMAS }
BEYNON, Clerk, - - - - - } *Respondents.*

A being possessed of a term in lands for ninety-nine years, if she, and *B*, and *C*, and *D*, her daughters by a deceased husband, should so long live, intermarries with *E*, whereupon a settlement is made of the property of *A*, including the term which is assigned in trust for *A* and *E* during their joint lives, remainder to the survivor, his or her executors, &c. *E* dies in the life-time of *A*, by his will treating as his own the term of years in settlement, and bequeathing it to *A* for life, remainder to *B* for life, remainder to *C* for life, remainder to *D* for the residue of the term. He also by his will bequeaths the residue of his personal estate to *A*, and leaves her sole executrix. *A* proves the will and administers to the estate, and dies, having made a will bequeathing all her personal estate to *B*, whom she appointed sole executrix. *B*, having married *X*, proved the will. *X*, in the right of *B*, entered and held possession of the lands until her death, when he gave up the possession to *Y*, who took possession as in the right of *C*, whom he had married. But afterwards *B* filed a bill against *Y* and *C*, and also against *D*, stating that he was ignorant of the settlement when he gave up possession of the premises, and had lately discovered its existence, and the right of *B*, his deceased wife and testatrix under it; and praying restoration of the possession, and an account of rents received, and payment of them, or an occupation rent during the wrongful possession.

By the answer to this bill, the defendants relied upon the will of *E*, and the acceptance by *A* of benefits under it amounting to an election. They also filed a cross bill against *X*,

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stating the will of *E*, and that *A*, being appointed executrix under it, had proved the will, and acted under it, paying the debts, and retaining a large residue, and praying that it might be declared that *A* was bound to elect, and had elected, to waive her right to the term, and to take the benefit given to her by the will of *X*, and that they were entitled to the residue of the term, according to the will of *X*: but the cross bill did not make the personal representative of *A* in that character a party, nor pray any account of the personal estate of *E* possessed by her. Under these circumstances it was held in the Court below, and affirmed on appeal, that no election by *A* had been proved in the cause, and that *X*, in right of his wife, was entitled to the possession of the term under the will of *A*, supposing the term to have passed by the terms of her will.

BY Indenture bearing date the 16th of February, 1756, and made between Bridget Bevan of the one part, and Gwenllian Jones of the other part, Bridget Bevan demised to Gwenllian Jones the messuage, barn, stable, garden, and fields, therein described, to hold to Gwenllian Jones, her executors and administrators, for ninety-nine years, if Gwenllian Jones, and Margaret, Bridget, and Elizabeth, her daughters, or either of them, should so long live, at the yearly rent of £92.

By indenture or deed of marriage settlement, bearing date the 31st of January, 1758, and made between Thomas Thomas of the first part; David Edwards and John Harries of the second part; Gwenllian Jones of the third part; and Margaret Jones, Bridget Jones, and Elizabeth Jones, infant children of Gwenllian Jones by William Jones, her former husband, deceased, of the fourth part; reciting a marriage then intended to be had between Thomas Thomas and Gwenllian Jones: it was witnessed that in consideration of the marriage, and for making provision for Margaret Jones, Bridget Jones, and Elizabeth Jones, the infant children of

Gwenllian Jones, all and every the leasehold messuages, lands, tenements, and hereditaments whatsoever, of Gwenllian Jones, and which she was entitled to or held by lease or leases, from any person or persons whatsoever and wheresoever, were assigned to hold to David Edwards and John Harries, their executors, administrators, and assigns, to hold from thenceforth for the residue and remainder of the term or terms of years in and by the lease or leases granted and then to come and unexpired, in trust, for Gwenllian Jones, her executors, administrators, and assigns, until the marriage, and after the solemnization thereof, upon trust, to permit Thomas Thomas and Gwenllian Jones, during their joint lives, to receive the rents and profits of the leasehold estates, and likewise to have the use and enjoyment of all the rest of the personal estate and effects of Gwenllian Jones, and the produce and increase thereof; and from and after the decease of either of them, to assign and transfer the leasehold estate and effects to the survivor, and the executors, administrators, and assigns of such survivor.

Shortly after the execution of the indenture or deed of marriage settlement, a marriage took effect between Thomas Thomas and Gwenllian Jones.

John Harries, one of the trustees, died in the year 1782, leaving David Edwards surviving; whereby David Edwards became the sole surviving trustee.

David Edwards, the surviving trustee, died in the year 1794, and the Respondent, Thomas Beynon, and Peter Dubuison, deceased, were the executors of, and proved his will: Peter Dubuison died in December, 1812, leaving the Respondent, Thomas Beynon, surviving executor of the will of John Harries.

Thomas Thomas died in the year 1776, leaving Gwenllian, his widow, surviving. By his will, dated

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in 1769, he made the following provisions ; “ I give
 “ all the estate which I hold by lease from Mrs. Bevan
 “ to Gwen. my dear and beloved wife, for and during
 “ the term of her natural life ; and from and after her
 “ decease to Margaret Jones, (the wife of the Re-
 “ spondent Thomas Edwards,) for the term of her
 “ natural life ; and immediately from and after her
 “ decease to Bridget Jones, (the Appellant, Bridget
 “ Morgan,) for and during the term of her natural life;
 “ and immediately from and after her decease to Eli-
 “ zabeth Jones, (the Appellant, Elizabeth Morris,) for
 “ and during the remainder of the term granted in
 “ the said leasehold estates.” And he gave and be-
 queathed to Gwenllian his wife all the residue of his
 personal estate, goods, chattels, furniture, cattle, imple-
 ments of household and husbandry, and all his stock
 and effects, for ever, if she continued his widow, and
 appointed her sole executrix of his will.

Margaret Jones, in 1785, intermarried with the Re-
 spondent, Thomas Edwards ; Bridget Jones intermar-
 ried with John Morgan in 1778. Gwenllian Thomas
 died in 1790, having made a will, dated in 1785, by
 which she bequeathed to Margaret Jones “ *all her*
 “ *money in the funds, and all the rest of her personal*
 “ *estate, of what nature or kind soever, for her own*
 “ *use,*” and appointed her sole executrix. Upon the
 decease of Gwenllian Thomas, Margaret Edwards,
 with the concurrence of the Respondent, Thomas Ed-
 wards, proved the will in the proper Ecclesiastical
 Court ; and thereupon the Respondent, Thomas Ed-
 wards, and his wife, entered into the possession of the
 leasehold estate demised to Gwenllian Thomas by
 Bridget Bevan.

In 1818 the Respondent, Thomas Edwards, filed a
 bill in the Exchequer, against the Appellants, and

Thomas Beynon, which bill was afterwards amended. The bill stated the facts before mentioned, except the will of Thomas Thomas, and then proceeded to state that Thomas Edwards, at the decease of his wife, was ignorant of the existence of the indenture of settlement, and that the Appellants, John Morgan and Bridget his wife, represented to Thomas Edwards, that they were entitled to the leasehold estate, by virtue of a will made by Thomas Thomas; that he, being deceived by such representations, and ignorant of his right, yielded up the possession of the leasehold premises to John Morgan and Bridget his wife; that they had ever since continued in possession, and in receipt of the rents and profits of the leasehold premises; and that he, Thomas Edwards, had then lately discovered the existence of the indenture of marriage settlement.

The prayer of the bill was, that John Morgan and Bridget his wife might deliver up to Thomas Edwards the possession of the leasehold premises, and the deeds relating thereto, particularly the indenture of marriage settlement, bearing date the 31st of January, 1758, and the indenture of lease bearing date the 16th of February, 1756; and that John Morgan and Bridget his wife might also account for, and pay to Thomas Edwards, the arrears of rent for the premises, or the value of the premises to be let for the time during which they had been in the possession of the same: and that such account might be taken by and under the decree, order, and direction of the Court; and that in the mean time a receiver of the rents and profits of the premises might be appointed, by and under the decree, order, and direction of the Court; and that the Respondent, Thomas Beynon, might, under the decree, order, and direction of the Court, assign the leasehold premises to the Respondent, Thomas Edwards.

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John Morgan and Bridget his wife, in their answer to the bill, admitting most of the facts, set forth the will of Thomas Thomas as before stated ; and farther stated, that Thomas Thomas died in 1776, without altering or revoking his will ; and that Gwenllian Thomas, upon the death of Thomas Thomas, proved his will in the proper Ecclesiastical Court, and took upon herself the execution thereof, and by virtue of the probate copy of the will, possessed herself of the testator's personal estate and effects to a considerable amount, and thereout paid and satisfied his funeral expences and debts ; after which there remained a very large surplus, which was of much greater value than the leasehold estate ; and that Gwenllian Thomas, after the death of her husband, entered into possession of the leasehold estate, and continued in such possession to the time of her death.

The answer further stated that Gwenllian Thomas died in the year 1790, and that thereupon Thomas Edwards and his wife entered into possession of the leasehold estate demised to Gwenllian Thomas ; that Thomas Edwards, long before the death of his wife, well knew of the existence of the indenture of settlement : and that upon the death of the Respondent, Thomas Edwards' wife, in the year 1807, the Appellant, John Morgan, in right of the Appellant, Bridget his wife, entered into the possession of the leasehold premises, with the permission of the Respondent, Thomas Edwards, and had ever since been and then was in the possession and receipt of the rents and profits thereof, and that the Respondent, upon the death of his wife, voluntarily delivered up the indenture of lease to the Appellant, John Morgan, and soon afterwards delivered notices to some of the tenants of the leasehold premises, signed by him, requiring

such tenants to quit their holdings at Michaelmas then next ensuing, and admitted the Appellants were entitled to the leasehold estates by virtue of the will of Thomas Thomas: that although by the terms of the marriage settlement the leasehold premises were assigned to the trustees therein named, upon trust, after the decease of Thomas Thomas and Gwenllian his wife, to assign and deliver up the same to the survivor of them, and the executors and administrators of such survivor; and although Gwenllian Thomas survived her husband, and thereby, under the settlement, became entitled to the leasehold premises; yet that Thomas Thomas, by his will, took upon himself to dispose of the leasehold premises as his own, and that he also gave to Gwenllian Thomas the residue of his personal estate and effects, to the amount of £2000 and upwards, and that the same was of much greater value than the lease; and that Gwenllian Thomas accepted such bequest, and took under the will benefits of greater value than the leasehold premises, and frequently declared that the leasehold premises, after her death, would go to her daughters in succession, one after the other, and therefore it was submitted that Gwenllian Thomas must be considered as having made her election to take under the will, and to have thereby confirmed the bequest of the leasehold premises; and that the Appellants ought not to be compelled to deliver up the possession of the leasehold premises, nor the deeds relating thereto, nor the lease of the 16th day of February, 1756, nor to account for and pay to the Respondent, Thomas Edwards, the arrears of rent of the premises, nor the value of the premises.

The Appellant, Elizabeth Morris, also put in her answer to the bill, which was to the same effect as the answer of the other Appellants; and the Re-

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spondent, Thomas Beynon, also put in his answer to the bill.

In 1822, the Appellants filed against the Respondents a cross bill, stating the substance of the answer to the original bill, and praying that it might be declared that Gwenllian Thomas was bound, on the death of Thomas Thomas, to make election, and that she did elect to take the benefit of Thomas Thomas's will, as to his residuary personal estate, and that she thereby relinquished the benefit of the indenture of settlement, as to the leasehold estate and premises; and that it might be declared that John Morgan and Bridget his wife, in her right, were entitled to the leasehold premises, during her life; and that Elizabeth Morris would become entitled to the leasehold premises, immediately from and after the death of Bridget Morgan, during the existence of the lease; and that the Respondent, Thomas Beynon, might be decreed to execute a proper assignment of the leasehold premises to the Appellants, according to the will of Thomas Thomas.

Thomas Edwards by his answer to the cross bill stated that he had heard and believed it to be true, though he did not know the same of his own knowledge, that Gwenllian Thomas possessed herself of all or some of the estate and effects belonging to Thomas Thomas, at the time of his death, and to a considerable amount in the whole, and more than sufficient to pay, and that she did thereout pay and satisfy his debts, funeral and testamentary expenses and legacies, and that the clear residue of the personal estate, excluding therefrom the leasehold estate and premises, remained in the hands of Gwenllian Thomas, and that she was beneficially entitled thereto, under the will of Thomas Thomas, as his residuary legatee; and that Gwenllian Thomas ap-

plied the whole of the clear residue to her own use and benefit, and that she accepted of the bequest thereof made to her by the will of Thomas Thomas.

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The answers in both suits having been replied to, witnesses were examined in the first-mentioned cause of *Edwards v. Morgan*, both on the part of the Appellants, John Morgan and Bridget his wife, and Respondent, Thomas Edwards.

The evidence on the part of the Appellants proved declarations by Gwenllian Thomas, that after her death the leasehold premises would go or belong to the Appellant, Bridget Morgan, and that upon the death of Bridget the same would go or belong to the Appellant, Elizabeth Morris.

The evidence on the part of the Respondent, Thomas Edwards, only proved notices to produce deeds.

Both the causes were heard on the 8th of November, 1824, when it was decreed that the Appellants, John Morgan and Bridget his wife, should forthwith deliver up to the Respondent, Thomas Edwards, the possession of the leasehold premises, in the pleadings mentioned, and that the indenture of lease should be forthwith delivered up by the Appellant, John Morgan, to the Respondent, Thomas Edwards, or such person as he should appoint to receive the same, together with any other title-deeds, papers, or writings, in the possession, custody, or power of the Appellant, John Morgan, relating to the title of the leasehold estate; and that the Respondent, Thomas Beynon, should forthwith deliver up to the Respondent, Thomas Edwards, or to such person as he should appoint to receive the same, the indenture of settlement, and should execute to the Respondent, Thomas Edwards, or to such person as

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he should appoint, a proper deed of assignment of the lease, &c. And it was thereby referred to the Master to take an account of the rents and profits of the leasehold premises possessed and received by the Appellant, John Morgan, since Hilary Term, 1818, the time of filing the original bill, down to the time when the Appellant should deliver the possession up to the Respondent, Thomas Edwards: and in case it should appear that the Appellant, John Morgan, had been in the actual possession and enjoyment of the leasehold premises, or any part thereof, then the Master was to settle a fair occupation rent for the same during the time of such occupation. And it was further ordered, that what the Master should find to be the amount of such rents and profits of the leasehold premises, should be paid by the Appellant, John Morgan, to Thomas Edwards. And it was thereby referred to the Master to tax Thomas Beynon his costs of the original suit, which costs, when taxed, were to be paid by Thomas Edwards to Thomas Beynon, or his clerk, in court; but the Court did not think fit to give costs to any other party to the original bill. And it was further decreed, that the cross bill filed by the Appellants against the Respondents should be and the same was thereby dismissed out of court with costs.

Against this decree the appeal was presented.

For the Appellants:—*The Attorney General* and
Mr. H. Martyn.

It is clear that the will of Thomas Thomas raised a case of election on the part of Gwenllian Thomas, as to the leasehold premises, and to the residuary personal

estate of Thomas Thomas; and it having been admitted by the answer of the Respondent, Thomas Edwards, that Thomas Thomas died possessed of personal property more than sufficient to pay his debts, and that his residuary personal estate and effects was possessed by Gwenllian Thomas, and applied by her to her use, it must at this distance of time be inferred and presumed, that Gwenllian Thomas elected to take under the will of Thomas Thomas, and to give effect to his will in regard to the bequest of the leasehold premises.

If Gwenllian Thomas did not intend to give effect to Thomas Thomas's will, so far as regards the bequest of the leasehold premises, it was incumbent upon her to have kept accounts of the personal estate of Thomas Thomas possessed by her, and of her payments out of such personal estate, and to have ascertained the residue of such personal estate, so that the Appellants, Bridget Morgan and Elizabeth Morris, might be compensated out of such residue for the loss they sustained by Gwenllian Thomas not giving effect to the bequest of the leasehold premises contained in their favour in Thomas Thomas's will. The length of time since the death of Thomas Thomas, rendered it now impossible to ascertain the amount of the residuary personal estate of Thomas Thomas.

Even assuming that it is not to be inferred or considered that Gwenllian Thomas did elect to take under Thomas Thomas's will, and to give effect to such will, so far as regards the bequest of the leasehold premises, yet the Respondent, Thomas Edwards, claiming the leasehold premises under Gwenllian Thomas, is bound to make compensation to the Appellants, Bridget Morgan and Elizabeth Morris, for the value of the interest they took in such leasehold estates under the

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1827. will of Thomas Thomas; and the decree does not give
 { MORGAN or provide for such compensation. Butrick v. Broad-
 and others hurst^a. Andrew v. Trin. Hall, Cambridge^b. Broome
 v. Monck^c. Tibbitts v. Tibbitts^d.
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For the Respondents:—*Mr. Shadwell* and *Mr. Sclater*.

The will of Thomas Thomas did not raise a case of election; and even if it did raise a case of election, in all cases of election, a party having two claims has the option of either, and cannot be held concluded by equivocal acts performed in ignorance of the value of the funds, or in ignorance of the necessity of electing. It cannot be held, that Gwen. Thomas did in her lifetime elect to renounce her absolute right to the tenements in question, there being no evidence that she was apprised of any necessity to make election.

As to the dismissal of the cross bill with costs, all the facts and circumstances of the case were sufficiently disclosed by the pleadings in the original suit, and it was competent for the Appellants to have proved their case (if it had been capable of proof) by evidence in the original suit, and the trustee, by his answer to the original bill, submitted to assign to such party as the Court should declare entitled; at all events the costs of the cross suit are properly directed to be paid by the plaintiffs therein, as the cross bill could, in any case, only be necessary as a bill of discovery. The cross bill did not pray any account of the personal estate of Thomas Thomas, alleged to be possessed by Gwen-


^a 1 Ves. J. 171.

^b 9 Ves. J. 525.

^c 10 Ves. J. 609.

^d 19 Ves. J. 656.

llian Thomas, and there was not any personal representative of Thomas Thomas or of Gwennllian Thomas made a party to the original bill or the cross bill. Dillon *v.* Parker^e. Stratford *v.* Powell^f. Boynton *v.* Boynton^g. Newman *v.* Newman^h. Wake *v.* Wakeⁱ. Whistler *v.* Webster^k. Gretton *v.* Howard^l.

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In the course of the argument, the *Lord Chancellor* made the following observations :

It must be taken for granted, that the words of the will passed leaseholds^m: if not, there is no representative as to that property before the Court, and it would be necessary to have an administration *de bonis non*.

It is said, that if the widow has not elected, her representatives must account for the personal estate. But how is the account to be taken? the personal representative is not before the Court. The bill should have prayed in the alternative either a declaration that the widow elected, or an account against her representatives. The former only is prayed. The prayer for general relief would have comprised the account, if there had been a representative of the widow before the Court.

The *Lord Chancellor*ⁿ.—The property at stake in this appeal is of little value, but the doctrine brought into question is of great importance, as it may affect other cases. I have a strong impression what ought to be the decision in this case; but, considering the

• 1 Swan. 381. ^f 1 Ba. and Be. 1. ^g 1 B. C. C. 445.
^h 1 B. C. C. 186. ⁱ 1 Ves. J. 335. ^k 2 Ves. J. 367.
^l 1 Swan. 409. ^m See *Woollam v. Kenworthy* 9 Ves. J. 137.
ⁿ At the conclusion of the argument.

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importance of the doctrine to be established, I propose
to adjourn the question for consideration.

On the 25th of May the judgment was affirmed
without farther observation, but without costs.

Judgment affirmed.

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 v.
 WILLANS.

(KING'S BENCH AND EXCHEQUER CHAMBER.)

JOSIAH TAYLOR, - - - *Plaintiff in Error.*

JOSEPH WILLANS, who, &c. *Defendant in Error.*

Under the penal Statute, 9 Anne, c. 14. enacting penalties against gambling, and giving half the penalty to the poor of the parish in which the offence is committed, a declaration, stating that W. at the parish of St. J. in the county of M. at one sitting, by playing at, &c. lost to T. £25. and then and there paid the same to T. is sufficiently certain. 1. (*semb.*) as to the allegation of the parish, although it appeared, *aliunde*, that there was another parish of St. J. in the county of M. and at all events such objection, if sustained, should be taken before, and is bad after, verdict: and the parish, entitled under the Act, may recover half the penalty from the plaintiff. 2. From the allegation that "W. by playing lost to T." it is a necessary implication that W. was playing with T. in a case where the statement of facts excludes the supposition of a loss by betting.

If in the assignment of errors it is alleged, that it appears by public Acts of Parliament, that there are two parishes of St. J. in the county of M. the plea of *in nullo est erratum* is not an admission of the truth of the allegation.

JOSEPH WILLANS, the Defendant in error, in Mich. Term, 1823, brought an action of debt in the Court of King's Bench, against Josiah Taylor, the Plaintiff in error. This action was founded upon the statute of the 9th of Anne, c. 14, s. 2. by which it is enacted, "That from the 1st of May, 1711, any person or persons whatsoever, who shall, at any time or sitting, by playing at cards, dice, tables, or other game

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or games whatsoever, or by betting on the sides or hands of such as do play at any of the games aforesaid, lose, to any one or more person or persons so playing or betting, in the whole, the sum or value of ten pounds, and shall pay or deliver the same, or any part thereof, the person or persons so losing and paying, or delivering the same, shall be at liberty, within three months then next, to sue for and recover the money or goods so lost and paid, or delivered, or any part thereof, from the respective winner and winners thereof, with costs of suit, by action of debt, founded on this Act, to be prosecuted in any of her Majesty's Courts of Record, in which actions or suits no essoin, protection, wager of law, privilege of Parliament, or more than one imparlance shall be allowed; in which action it shall be sufficient for the Plaintiff to allege, that the Defendant or Defendants are indebted to the Plaintiff, or received to the Plaintiff's use, the monies so lost and paid, or converted the goods won of the said Plaintiff to the Defendant's use, whereby the Plaintiff's action accrued to him, according to the form of this statute, without setting forth the special matter; and in case the person or persons who shall lose such money or other things as aforesaid, shall not, within the time aforesaid, really and bonâ fide, and without covin or collusion, sue, and with effect prosecute, for the money or thing, so by him or them lost and paid, or delivered as aforesaid, it shall and may be lawful, to and for any person or persons, by any such action or suit as aforesaid, to sue for and recover the same, and treble the value thereof, with costs of suit against such winner or winners as aforesaid, the one moiety thereof to the use of the person or persons that will sue for the same, and the other moiety to the use of the poor of the parish where the offence shall be committed."

The declaration consisted of thirty-eight counts, and the several penalties demanded amounted to the sum of five thousand four hundred and sixteen pounds. The material counts were the third, fifth, ninth, thirteenth, seventeenth, twenty-first, twenty-third, twenty-fifth, twenty-seventh, and thirty-seventh. In the third count it was stated, that one William Willans, on the 20th of March, 1822, at the parish of St. James, in the county of Middlesex, did, at one and the same sitting, by playing at a certain game called Rouge et Noir, lose, to the said Josiah Taylor, the sum of twenty-five pounds, and did then and there pay the same to the said Josiah Taylor; and that the said William Willans, did not, within three months next after the time he so lost and paid the said money, sue, or with effect or otherwise prosecute for the same; and that the space of three months had then elapsed, whereby and according to the form of the said Act of Parliament, made and passed in the ninth year of the reign of Queen Anne, an action had accrued to the said Joseph Willans, (who sued as aforesaid,) to sue for and recover, of and from the said Josiah Taylor, the said sum of twenty-five pounds, and treble the value thereof, making, together, the sum of one hundred pounds, parcel of the said sum of five thousand four hundred and sixteen pounds, above demanded.

The other counts were the same in substance and effect.

In the declaration it was averred, that Josiah Taylor had not paid or rendered the sum of five thousand four hundred and sixteen pounds, or any part thereof, to the poor of the parish of St. James, in the county of Middlesex, (being the parish where the several offences were committed,) and to Joseph Willans, or to either of them, but refused to do so; and, therefore, as well for

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the poor of the said parish as for himself, the said Joseph Willans brought his suit.

To this declaration, Josiah Taylor pleaded that he did not owe to, or unjustly detain from, the poor of the said parish and the said Joseph Willans, the said sum of five thousand four hundred and sixteen pounds, or any part thereof, in manner and form as the said Joseph Willans had above complained against him, and of this he put himself upon the country, &c. and the said Joseph Willans did the like.

The action was tried on 21st of January, 1804, before the Lord Chief Justice of the Court of King's Bench, when a verdict was found for Joseph Willans, as to the several sums of money demanded in the third, fifth, ninth, thirteenth, seventeenth, twenty-first, twenty-third, twenty-fifth, twenty-seventh, and thirty-seventh counts, making, together, the sum of six hundred and eighty pounds, and for Josiah Taylor, as to the residue of the sum of five thousand four hundred and sixteen pounds demanded by the declaration: Whereupon it was, amongst other things, considered by the Court of King's Bench, that the said Joseph Willans, who sued as aforesaid, should recover against the said Josiah Taylor, for the poor of the said parish of Saint James, in the county of Middlesex aforesaid, and for himself, the said Joseph Willans, the said several sums of money, in the third, fifth, ninth, thirteenth, seventeenth, twenty-first, twenty-third, twenty-fifth, twenty-seventh, and thirty-seventh counts of the said declaration respectively mentioned, making the said sum of six hundred and eighty pounds, parcel of the said sum of five thousand four hundred and sixteen pounds above demanded; and that the said poor of the said parish of St. James, in the county of Middlesex, should have one moiety thereof to their own use, and that the

said Joseph Willans, who sued as aforesaid, should have the other moiety thereof to his own use, according to the form of the statute in such case made and provided.

A writ of error was brought, returnable, in the Court of Exchequer Chamber, at Westminster, by Josiah Taylor, from the judgment of the Court of King's Bench: upon which Josiah Taylor assigned the same errors as those hereinafter set forth, and the judgment of the Court of King's Bench was affirmed in the Exchequer Chamber.

From these judgments a writ of error was brought, returnable, in Parliament, whereon Josiah Taylor assigned the following errors:—

That the declaration aforesaid, and the matters therein contained, are not sufficient, in law, for the said Joseph Willans, who sued as aforesaid, to have or maintain his aforesaid action thereof against the said Josiah Taylor.

That although it appears by public Acts of Parliament, that there are only two parishes of Saint James in the county of Middlesex aforesaid, that is to say, one parish called the parish of Saint James, Clerkenwell, otherwise called the parish of Saint James at Clerkenwell, and another parish called the parish of Saint James, Westminster, otherwise called the parish of Saint James within the city and liberties of Westminster, in the county of Middlesex; yet it does not appear by the record aforesaid, whether the said Joseph Willans sued as well for the poor of the said parish of Saint James, Clerkenwell, otherwise called the parish of Saint James at Clerkenwell, or for the poor of the parish of Saint James, Westminster, otherwise called the parish of Saint James, within the city and liberty of Westminster, in the county of Middlesex aforesaid, as for himself in that behalf.

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That it does not appear by the record aforesaid, whether the supposed offences in the third, fifth, ninth, thirteenth, seventeenth, twenty-first, twenty-third, twenty-seventh, and thirty-seventh counts of the said declaration mentioned, or any or either of them, were or was committed in the parish of Saint James, Clerkenwell, otherwise called the parish of Saint James, at Clerkenwell, or in the said parish of Saint James, Westminster, otherwise called the parish of Saint James, within the city and liberty of Westminster, in the county of Middlesex aforesaid.

That it does not appear by the record aforesaid, that the said William Willans, at the respective times in the third, fifth, ninth, thirteenth, seventeenth, twenty-first, twenty-third, twenty-fifth, twenty-seventh, and thirty-seventh counts of the said declaration mentioned, did lose, to the said Josiah Taylor, the said several sums of money in those counts respectively mentioned, or any or either of them, by playing with the said Josiah Taylor, at the said game called Rouge et Noir, in those counts respectively mentioned.

That it does not appear by the record aforesaid, that the said Josiah Taylor, at the said respective times in the said third, fifth, ninth, thirteenth, seventeenth, twenty-first, twenty-third, twenty-fifth, twenty-seventh, and thirty-seventh counts of the said declaration mentioned, did play with the said William Willans, at the said game called Rouge et Noir, in those counts respectively mentioned.

That it does not appear by the record aforesaid, that the said William Willans, at the respective times in the said third, fifth, ninth, thirteenth, seventeenth, twenty-first, twenty-third, twenty-fifth, twenty-seventh, and thirty-seventh counts of the said declaration mentioned, did, at one and the same sitting, by playing at

the said game called Rouge et Noir, lose, to the said Josiah Taylor so playing, the said several sums of money in those counts respectively mentioned, or any or either of them.

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That it does not appear by the record aforesaid, that at the respective times in the said third, fifth, ninth, thirteenth, seventeenth, twenty-first, twenty-third, twenty-fifth, twenty-seventh, and thirty-seventh counts of the said declaration mentioned, the said William Willans did lose, to the said Josiah Taylor, the said several sums of money in those counts respectively mentioned, by their playing together, or with each other, at the said game called Rouge et Noir, or by betting on the sides or hands of such as did play at the said game.

That by the record aforesaid it appears, that the judgment aforesaid, in the form aforesaid given, as to the several sums of money in the third, fifth, ninth, thirteenth, seventeenth, twenty-first, twenty-third, twenty-fifth, twenty-seventh, and thirty-seventh counts of the said declaration mentioned, making, together, the said sum of six hundred and eighty pounds, parcel of the said sum of five thousand four hundred and sixteen pounds, above demanded, was given for the said Joseph Willans against the said Josiah Taylor; whereas, by the law of the land, the said judgment, as to those several sums of money, ought to have been given for the said Josiah Taylor against the said Joseph Willans.

That the judgment aforesaid was affirmed in the Court of our Lord the King of Exchequer Chamber, at Westminster, before the Justices of the Common Bench and the Barons of the Exchequer, whereas no such affirmance of the said judgment ought to have been given thereupon, but by the law of the land the said judgment ought to have been reversed.

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Joseph Willans joined in error thereto, and said, that there was no error, either in the record and proceedings aforesaid, or in giving and affirming the judgment aforesaid.

For these and other errors in the record and proceedings Josiah Taylor sued out a writ of error, praying that the judgment might be reversed.

For the Plaintiff in error, *Mr. Broderick.*

It is essential to describe, with accuracy, the parish in which offences against the 9th of Anne, c. 14. are alleged to have been committed, otherwise the poor of that parish cannot recover the moiety of the penalties for which the verdict may be given; but it is uncertain, upon the present record, whether the offences were committed in the parish of St. James, Clerkenwell, or in the parish of St. James, Westminster, which are the only two parishes of St. James in the county of Middlesex. The Statute of the 9th of Anne, c. 14. which is a penal statute, and must be construed strictly, extends only to the cases of parties who lose and win above ten pounds, by playing together at any unlawful game, or by betting together on the sides or hands of persons who are playing at such unlawful game; but it is not alleged upon the present record, that William Willans and Josiah Taylor, the parties who are stated to have lost and won the money, were either playing together at any unlawful game, or were betting together on the sides or hands of persons playing at such game. No intendment can be made of that which is not expressly averred in a penal action, unless it be a necessary inference, *Lynall v. Longbottom*. It is not averred, that William Willans was play-

ing at any unlawful game with Josiah Taylor, nor that he was playing at such unlawful game with any other person, and betting with Josiah Taylor, nor that he was betting with Josiah Taylor upon the sides or hands of any persons who were playing at such game: and it is doubtful whether the words of the Act would extend to a case where *A.* is playing and bets with *B.* who is not playing.

It being assigned upon the record for error that it appears by Acts of Parliament that there are two parishes of St. James in Middlesex, the Defendant in error by pleading *in nullo est erratum* admits the fact so assigned upon record, *Edmunds v. Probert*.^b To avoid this consequence the Plaintiff should have demurred for duplicity.

For the Defendant in error, *Mr. Patteson*.

The Court cannot take judicial notice of the names of all the parishes in the county of Middlesex, and cannot therefore know, as matter of law, whether there be or be not a parish called the parish of St. James in the county of Middlesex. After verdict, it must be intended that there is a parish called the parish of St. James in the county of Middlesex, in as much as the Plaintiff could not have obtained a verdict without proving the offences mentioned in the declaration to have been committed in that parish. The misnaming of the parish, if it be misnamed, is an error in fact, and not in law, and cannot be assigned together with other errors. The misnaming of the parish, if it be misnamed, is matter of form only, and cannot by law be assigned for error. It sufficiently appears by the allegation in the declaration, that William Willans did play with

^b Carth. 338. and see Bac. Abr. *Error* K. 2.

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the Plaintiff in error, in as much as it is averred that William Willans did, at one and the same sitting, by playing at Rouge et Noir, lose to the Defendant a certain sum of money, which could not have been the case if he had not played with the Defendant. Such averment is at all events sufficient after verdict.

The plea *in nullo est erratum* is in substance a demurrer. At the utmost it only prevents advantage being taken of misjoinder in the assignment of errors. It is still open to say that the error alleged is not well assigned. The case of *Edmunds v. Probert*^a is no authority. It is argued that *in nullo est erratum* admits the fact. So does a demurrer. Such a plea is a demurrer. *King v. Gosper Yelverton*, 58. *Morris, v. Fletcher*, Cro. Car. 53. So in the case in *Carthew*, it was held, that joining error in fact with error in law would be bad on general demurrer. So in *Jeffrey v. Wood*. 1 Stra. 489. *Burdett v. Wheatley*. 2 Raym. 883. Error in fact and error in law cannot be assigned together, because they require different modes of trial. In *Hudson v. Banks*^b it was argued, that *in nullo est erratum* admitted an allegation of facts made upon the assignment of errors, but it was held otherwise because it was contrary to the record. It appears by the record that the parish of St. James is in the county of Middlesex. The error assigned cannot stand because it contradicts the record. The assignment speaks of Acts of Parliament; those Acts should have been shewn. If the description of the parish is wrong, the objection should have been taken at the trial for a variance. It may be argued that it could not be the subject of a nonsuit. If it is rightly described and there are two such

^a 2 Wils. 36. b. The cases are collected in 2 Bac. Abr. qua sup.

^b Co. Jac. 28.

parishes, the subject matter is incapable of distinction.
Doe v. Harris. 5. M. and S. 326^c.

If it be admissible as error in fact, the allegation is not substantively that there are two parishes, but that it appears by Acts of Parliament upon which no issue can be taken ; for Acts of Parliament are in the breast of the Legislature.

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In the course of the argument the *Lord Chancellor* made the following observations :

Upon that part of the argument in which it was said to be doubtful whether the Act would extend to a case where one of the parties playing betted with a party not playing,—

The Lord Chancellor said:—If the bet was on the game, he must be betting on one side.

Upon the argument that there was no averment, that Taylor was playing with Willans, that the allegation was that he lost by playing, the *Lord Chancellor* observed, that the allegation was of loss “to another person” by playing, and he added, “How can one man lose to another but by playing or betting with him.” Is there any authority which decides, that where *A.* is playing with *B.* and bets with *C.* the case is not within the Act. “If the fact is necessarily implied from what is stated, it is sufficient. The question upon this argument is, whether it is not a necessary implication from the facts alleged that there was a playing with Taylor.”

The Lord Chancellor^b.—I am not sure that I know the precise objection. Is it that St. James should be distinguished by the addition of Clerkenwell? If St. James is the proper name, it is indifferent, whether it

^c See *Doe v. Salter*, 13 East. 9. *Taylor v. Hooman* 1 Moore 161.

^d At the conclusion of the argument.

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is in Clerkenwell or Westminster. As to the argument that the distinction in pleading is necessary, order that the poor may have their share of the penalty if the Plaintiff recovers the whole, the parish entitled to the moiety may recover over from the Plaintiff. Is it necessary that the whole matter should appear on the record? Suppose there are two parishes of the same name in a county, is it not sufficient in pleading as to one of them, to describe it generally? What authority is there for the contrary position? If the parish of St. James is not the proper name, that was matter of nonsuit, and you cannot take advantage of such a variance by writ of error. It appears that St. James is the proper name, and that the rest is only matter of superfluous description. If the name is not properly stated in the declaration, advantage should have been taken of it upon the trial. It cannot now be alleged as an error in fact.

As to the second point, it is not possible for a person playing to lose to another (except by betting, which is not this case) unless he is playing with him.

Judgment affirmed without costs.

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and others.

The Right Honourable THOMAS Lord } *Appellant ;*
Baron TRIMLESTOWN, - - -


**EVAN LLOYD, Esquire, a Lieutenant-
 General in His Majesty's Army,
 and ALICIA LADY BARONESS
 TRIMLESTOWN, his wife; - -**

ALSO,

**ROSALIE COUNTESS D'ALTON, PE-
 TER COUNT D'ALTON, her Hus-
 band, RICHARD D'ALTON and
 EDWARD D'ALTON, Minors, by
 the said PETER COUNT D'ALTON,
 their Father and next friend, -** } *Respondents.*

T. from time to time during his life prepares instructions for his will, and causes drafts to be prepared upon those instructions. At his death he leaves various testamentary papers, executed so as to pass his property; under which papers his son by a first wife, and the issue of that son: his widow, (a second wife,) his daughter with her children, and ulterior remainder-men, might severally claim interests. By the last of these testamentary papers the provision for the widow and the daughter and her children was considerably increased. The Testator died in 1813. In 1814 the daughter, with her husband and children, filed a bill in Equity to establish the last will, and effectuate the charge in their favour. In the same year the widow filed a bill in the same Court, to establish the same will and her interests under it. In 1816 the son and heir filed a bill in the same Court, impeaching the will as obtained by fraud and the improper influence of the widow, and praying a declaration of its invalidity, and an issue at law to try the question.

In the first of these causes, (the suit on behalf of the daughter and her children,) by a decretal order, an issue was directed to enquire by a trial at bar whether the last testamentary paper was the will of T.

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The widow with her husband were to be the plaintiffs in the action, the son and heir to be the defendant, and the daughter with her husband were to be at liberty to appear in the action and defend their rights and that of their children. Upon the trial of the issue the Jury found a verdict for the defendant. In the course of the trial several of the testamentary instruments executed by the Testator were produced in evidence; but the only point submitted to the consideration of the Jury was the general question of the validity or the invalidity of the last testamentary paper. Application being made to the Court of Equity for a new trial upon the grounds, 1. that the evidence given by two of the witnesses upon the former trial had been improperly admitted; 2. of misdirection by the Judge; 3. that the verdict was contrary to evidence; the Lord Chancellor having required of the Judges who tried the issue a report of only part of the evidence; the Judges returned a report confined to the evidence of two witnesses; upon consideration of which the Court refused the application to set aside the verdict.

Against this decision there was an appeal to the House of Lords, who remitted the cause to the Court below, with directions to call for a full report of the notes of the Judges upon the trial of the issue. In consequence of this remit, a full report having been required and returned, the application for a new trial was reconsidered, and thereupon a new trial was granted and the issue was varied by adding to the original inquiry "whether the testamentary paper" (the subject of first issue) "was the last will of the testator," a farther inquiry "whether any and what paper writing is the last will of &c." Against this new order the son and heir appealed to the House of Lords.

Held that the variation of the issue not resting upon any allegation in the pleadings of any other testamentary instruments but that which was the subject of the first issue, was unauthorized; that the issue was defective in not directing a specific inquiry whether any part of the last testamentary paper, e.g. that under which the daughter and her children took interests, was valid, although the provision for the wife was void; which point ought to have been submitted to the Jury by the Judge at the trial, but was not so; that the order was erroneous in directing that the widow should be the plaintiff in the issue, leaving to the daughter the Plaintiff in the cause in which it was directed only liberty to appear and defend, &c. that the order and the issue were defective for want of parties taking interests under the several testamentary

papers; that the issue ought to have been directed upon a decree in the three causes; and that whether the new trial was granted or refused, no effective decree could be made in the cause in its actual state. Upon these and other grounds the cause was remitted to the Court below, with directions to enable the Court and parties to rectify the proceedings.

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THE Appellant was the only son of Nicholas Lord Trimlestown by his first marriage. The Respondent, Lady Trimlestown, was the widow of Lord Nicholas, afterwards married to Respondent General Lloyd. The Countess D'Alton is the only daughter of Lord Nicholas, and the other Respondents were her two sons.

Lord Nicholas, in August, 1797, intermarried with the Respondent Lady Trimlestown. Upon that marriage, he received, as a portion with his wife, £2000, and settled a jointure of £800 a year upon her for life, charged upon his Dublin and Meath estates.

In December 1797, by a will duly executed, Lord Nicholas confirmed the jointure of £800 a year, settled upon the Respondent Lady Trimlestown, and charged the same upon additional estates; and subject thereto he devised the whole of his real estates (except a small part which he directed to be sold for payment of debts) to the Appellant for life, with remainder to the Appellant's son, Thomas Barnewall, and his issue male, in strict settlement; remainder to any future sons of the Appellant, in tail male, with remainder to any future sons of the Testator, in tail male, remainder to Appellant's daughters for life, remainder to Testator's daughter, the Respondent Rosalie Countess D'Alton, for life, with several remainders over in favour of her children and their issue, remainder to his own right heirs. The will contained powers of leasing, jointure-

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ing, and charging, with portions, and gave a legacy of £400 to the Respondent Lady Trimlestown, and £50 to the Countess D'Alton. All the residue of the property was given to the Appellant.

In the year 1802, Lord Nicholas became intitled to the Turvey or Kingsland estate, as heir of his cousin the late Viscount Kingsland; and shortly afterwards gave instructions to have a codicil prepared, whereby he proposed to revoke the devises in remainder made by his will in favour of the Countess D'Alton, and her children and their issue, and to entail his estates so that they might attend the title of Trimlestown; and by the same codicil he proposed to devise the Turvey or Kingsland estate to the Appellant and his male descendants. A codicil was prepared according to these instructions, and revised by Mr. Butler; but it was not executed, Mr. Butler having stated his apprehensions that it was defective, and recommended a new will to be made, incorporating the codicil.

On the 3d of November, 1802, Lord Nicholas executed a codicil, whereby he revoked the limitation of his real estates to his daughter the Countess D'Alton, and limited the same to go with the title. In other respects he confirmed the bequests of the will as to his daughter, and gave her an annuity of £800 for life, if the estates should descend to &c. In addition to the bequests of the will, he also gave to his wife £200 per annum for life, with diamonds and furniture. The Turvey or Kingsland estate he devised to the Appellant his son, of whom he spoke in terms of great affection, and directed that when a certain annuity then charged upon the Turvey estate should be extinct, a further annuity of £200 should be paid to his wife. This codicil was found with the signature and seal torn.


In 1804 the draft of a codicil was prepared by Lord Herbert Stewart, the friend of Lady Trimlestown, which she was led to believe, by a stratagem of Lord Nicholas, that he had executed, when in fact it never was executed.

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By a will dated on the 1st of July, 1805, and which was duly executed, Lord Nicholas gave a rent charge of £400 to the Respondent Lady Trimlestown, in addition to her jointure of £800 a year, so long as she should remain single, declaring that if she should not remain single she would marry some person of rank and fortune, so as to make this £400 a year no object to her; he also bequeathed to her a legacy of £500; and he devised all his freeholds except the Turvey estate to the Appellant for life, remainder to Thomas Barnewall his (the Appellant's) son for life, with remainder to the first and every other son of Thomas Barnewall in tail male; with remainder to such person as should possess the title and dignity of Baron Trimlestown; and in case only of the extinction of his title, to the children of the Respondent Rosalie Countess D'Alton; and Lord Nicholas thereby limited the Turvey estate to trustees for the same uses as the other freeholds, and empowered the Appellant to charge his Turvey and Kingsland estate with £20,000, to discharge incumbrances upon his other estates: and he bequeathed all the residue of his property, of what nature or kind soever, to the Appellant. By this will he also gave an annuity of £300 to the Respondent Countess D'Alton, charged on his estates.

Of this will of the 1st of July, 1805, Lord Nicholas executed duplicates, one of which he left with Mr. Addis, the other he lodged in the hands of his relation Robert Barnewall, but both the parts in September 1810, were given up to Lord Nicholas by his desire.

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On the 25th of July, 1805, Lord Nicholas executed a codicil to his will, whereby he revoked the appointment by his will of 1805, of Mr. James Nangle, and Mr. Thomas Kemmis, as his executors and trustees, and appointed the Earl of Fingall, and Robert Barnewall, his trustees and executors.

On the 28th of September, 1810, Lord Nicholas executed a codicil to his will, by which he gave to the Countess D'Alton an annuity of £620 during her life, charged upon his estates in Dublin, &c.; a legacy of £5,000 to her daughter, Henrietta D'Alton; £400 to her son the Respondent Richard D'Alton; and £100 to her son the Respondent Edward D'Alton; and by the same codicil, he gave to Lady Trimlestown his house in Portland-place, and all the rest, residue, and remainder, of his personal estate; he also devised to her during her life, his house at Turvey, with the use of the gardens thereto belonging, and thirty acres of land immediately adjoining to the house.

On the 2d of August, 1812, Lord Nicholas executed another codicil to his will, in which reciting that he had made his last will and testament, and different codicils, (which he thereby confirmed, of whatever date they might be,) and had thereby devised his estates in the King's County, and County of Meath, but had made no disposition of his estates at Turvey, in the county of Dublin, counties of Longford, Roscommon, and Kildare, he devised to Lady Trimlestown, for her life, the house and demesne lands of Turvey, then in his own occupation, and containing about fifty-eight acres; and, after her death, the same were to go to the Appellant for his life; to whom he also devised the remainder of the Turvey estate, with remainder to the Appellant's son, Thomas Barnewall,

for life, with divers remainders over in strict settlement. This codicil then recites that he had *by his will* given to his daughter an annuity of £600 a year, which he confirms, and, if she should die before her husband, £300, part of the annuity, was to go to her son, the Respondent Edward D'Alton (in this codicil called Edward Thomas Nicholas D'Alton), during the life of the Count; and he gives a legacy of £3000 to the Respondent Richard D'Alton (in this codicil called Richard Charles D'Alton), charged upon his King's County estate: and ratifies and confirms his will and codicils, and all the gifts, devises, matters, and things therein contained, and he revokes the appointment of the executors in his former will and codicil, and appoints *Colonel O'Shee* an executor.

Lord Nicholas was asked by Mr. Kemmis, who prepared this codicil, to produce his will and codicils, but he *declined doing so, telling him that they were in England*, and Mr. Kemmis made a memorandum on the back of the draft of the codicil prepared by him, that he had not seen the will and codicils thereby referred to.


The draft of this codicil, as prepared by Mr. Kemmis, began as follows:

"Whereas I, Nicholas Lord Baron of Trimlestown,
 "have made my last Will and Testament, in writing,
 "bearing date the day of
 "in the year of our Lord
 "and have thereby devised my estates in the King's
 "County and County of Meath, *but have made no*
 "*disposition of my estate at Turvey, &c.*"

Lord Nicholas altered the draft, by drawing his pen through the words, "*in writing, bearing date the*
 " day of in the year of
 "our Lord ." And instead thereof,

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he inserted, after the words "my last will and testament," the following sentence, "*and different codicils which I hereby confirm upon whatever date they may be.*" But he did not correct the recital of his having made no disposition of the Turvey Estate.

On the 15th of November, 1812, a letter signed by Lord Nicholas was transmitted to Mr. Kemmis, containing the following inclosure in the handwriting of Lord Nicholas.

"Instructions to Mr. Kemmis for preparing my will.

" 1^o.—To revoke all former wills and codicils made by me.

" 2^o.—To direct that I may be buried, in a private manner, in the family vault at Trimlestown.

" 3^o.—To entail all my real estates in the county of Meath and *King's County* on my son John Thomas Barnewall, and my grandson, his son, Thomas Barnewall, and their issue male, (*subject, however, to my debts, and to the following legacies ;*) and all my family pictures, together with the Turvey Estate, after my beloved wife Lady Trimlestown's demise; all which I intend to entail strictly on my son and grandson, and their issue male, with a power to make a provision of 2,000*l.* a year on any future wife that they may have, and a power to charge the estates with a sum not exceeding 40,000*l.* as a provision for younger children that may be born from such future marriages; with all the usual limitations with respect to the grant of leases customary to entailed properties: and in failure of issue male in my son and grandson, I wish to entail the estate of Trimlestown upon the heir male of my family, who is next in succession to my title, as M. Barnewall of Fyans-town, and his issue male; and the *King's County*

“ estate, and the reversion of my Turvey estate, after
 “ Lady Trimlestown’s demise, I wish to entail on my
 “ daughter Countess D’Alton, and her heirs male,
 “ in succession ; by which I mean her son Richard ;
 “ and in the event of their succeeding, they are pos-
 “ sibly to take the name and bear the arms of Barne-
 “ wall, and in failure of my daughter, and her heirs
 “ male, above mentioned, I wish to entail these estates
 “ on my own heirs male above mentioned.

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“ 4^o.—I wish to bequeath to my beloved wife, Lady
 “ Trimlestown, all my personal property of every de-
 “ scription, save and except my family pictures, which
 “ are to be entailed, as before mentioned. I also leave
 “ to Lady Trimlestown my wife, the house, demesne,
 “ and estates of Turvey, with all the property thereunto
 “ belonging in the Counties of Kildare, Roscommon,
 “ and Longford, and Dublin, to enjoy during her
 “ natural life, in as full and complete possession as
 “ possible, with power to eject tenants and grant leases,
 “ as is usual in such cases. And I also bequeath to
 “ Lady Trimlestown, my wife, £5,000, to be secured
 “ to her on the King’s County estate.

“ 5^o.—I wish to bequeath to my daughter Countess
 “ D’Alton £600 a-year during her natural life, for her
 “ sole and separate use, independent entirely on her
 “ husband Peter D’Alton ; and to my grand-daughter
 “ Henrietta D’Alton £5000 ; to my grandson Rich-
 “ ard D’Alton £3000 ; and in the event of Count
 “ D’Alton’s outliving my daughter, I wish to leave
 “ my grandson Edward D’Alton, £400 yearly, during
 “ his father’s life.

“ I wish to name my cousin *Colonel John O’Shee*,
 “ and my brother-in-law *Colonel Henry Eustace*, to
 “ be the trustees and executors of this my will.

“ TRIMLESTOWN.”

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Upon these instructions a long correspondence followed between Lord Trimlestown and Mr. Kemmis, respecting the details of the will.

In pursuance of the instructions a will was drawn up and executed on the 8th of December, 1812, by which Lord Nicholas revoked all former wills and codicils, and then devised all his real estate to Colonel O'Shee, and Henry Eustace: as to the *King's County estate, subject to the jointure of £800 a year to Lady Trimlestown, and charged with the payment of all his debts and the legacies thereafter bequeathed*, to the use of Thomas Kemmis for 200 years, in trust for better securing the several annuities of £600 £400 and £400 thereafter respectively given to the Countess D'Alton and her sons Richard and Edward D'Alton; *and upon trust also to raise money for the payment of all the testator's debts and legacies*; and subject to the said term and the trusts thereof, to the use of William Kemmis and his heirs, during the life of the Countess D'Alton, in trust to pay her £600 a year during her life, and after her decease, in case her son, Richard D'Alton, should survive, and should not be her eldest son, then to the intent he should receive £400 a year during his life; and if Peter Count D'Alton should outlive the Countess D'Alton, then Edward D'Alton should receive £400 a year during his father's life: and he devised the Turvey or Kingsland estate to Lady Trimlestown for her life, without impeachment of waste. The estate in the County of Meath, called the Trimlestown Estate, he devised, "subject to the payment of the
 " annuities to the Countess D'Alton, Richard D'Alton, and Edward D'Alton, and interest upon his
 " debts and legacies, in aid and to supply any deficiency arising from the failure of the rents of his

“ King’s County estates, until the subsisting leases thereof should expire ;” together with the said King’s County estate, subject to the several charges and annuities aforesaid, and the said Turvey and Kingsland estate, after the death of Lady Trimlestown (who was younger than the Appellant), *to the use of the Appellant for life, with remainder to the Appellant’s son, the Hon. Thomas Barnewall, for life, with remainders over to his sons severally and successively in tail male, with remainders to any future sons of the Appellant, severally and successively in tail male ; and in default of such issue, the King’s County and Turvey estates were given over to the Countess D’Alton, and her children ; and the Meath or Trimlestown estate to the Barnewalls of Fyanstown, with divers remainders over. And Lord Nicholas, by the said will, gave to the Appellant, and his son Thomas Barnewall, respectively, as and when they should respectively be in actual possession of the King’s County, Meath, and Turvey estates, powers of jointuring with £2000 a year, and charging with £40,000 for the portions of daughters and younger sons. And he charged the King’s County estate with a legacy of £5000 for Lady Trimlestown ; £5000 for Henrietta D’Alton, to be paid on her marriage ; and a legacy of £3000 for Richard D’Alton ; and he bequeathed to Lady Trimlestown the whole of his personal estate (except his family pictures) exempt from the payment of his debts ; and he appointed Colonel O’Shee and Henry Eustace his Executors.*

Lord Nicholas died on the 17th of April, 1813, in the 87th year of his age, and was succeeded in his title by the Appellant.

The will was proved in the Ecclesiastical Court by

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Colonel O'Shee, without opposition ; but the Appellant afterwards instituted a suit (which is still depending) in the Ecclesiastical Court in Ireland, to recal the probate of the will.

On the 23d of April, 1814, the Respondents, Peter Count D'Alton and Rosalie, with Thomas Kemmis and William Kemmis, filed a bill in the Court of Chancery in England, against the Appellant, and Lady Trimlestown, the Hon. Thomas Barnewall, and others, seeking to have the will of the 8th of December, 1812, established, and an account taken of the debts and other incumbrances affecting the King's County estate; and also an account of what was due to the Countess D'Alton, in respect of the annuity of £600 given to her by the will, and praying that, in case it should appear the King's County estate was not equal to the payment of the annuity of £600, then that it might be decreed a charge on the Testator's estates generally; and that, in the mean time, a receiver might be appointed over the King's County estate, and directed to pay the annuity.

To this bill the Appellant put in an answer, whereby he disputed the validity of the will.

On the 29th June, 1814, Lady Trimlestown filed a bill in the Court of Chancery against the Appellant, the D'Altons, and others, praying (amongst other things) that the articles executed prior to her marriage, dated 8th August, 1797, whereby the said jointure of £800 a year was settled upon her, and also that the trusts of the will might be carried into execution; and that an account might be taken of what was due to her on the foot of the jointure, and also on the foot of the legacy of £500 given to her by such will, and the interest thereof; and that the Appellant might be de-

creed to pay what should be due, by a certain day, or else that a competent part of the *King's County estate might be sold for payment thereof*; and that a receiver might be appointed in the mean time.


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To the last mentioned bill also, the Appellant put in an answer, also disputing the validity of such will.

In the month of July, 1814, Lady Trimlestown intermarried with the Respondent Evan Lloyd, and shortly afterwards the bill filed by the Respondents Peter Count D'Alton and Rosalie his wife, and their trustees, was amended, and Evan Lloyd made a party defendant thereto; the Respondents Richard and Edward D'Alton were also made defendants thereto; and the Respondents, Evan Lloyd and Alicia (Lady Trimlestown) his wife, filed a bill of revivor for reviving the suit so instituted by the Respondent Lady Trimlestown, and which had abated by her marriage, and the same was revived accordingly. This bill was afterwards further amended by striking out the names of Thomas and William Kemmis, and making Richard and Edward D'Alton Co-Plaintiffs.

On the 19th July, 1816, the Appellant filed a bill in the Court of Chancery in Ireland against the Respondents and others, praying, amongst other things, that the will of 8th December, 1812, might be declared fraudulent and void, and be set aside accordingly, and that proper issues might be directed for the purpose of trying the validity of such will; and that the Appellant might have the necessary commissions for examination of witnesses out of the kingdom, and also of witnesses, *de bene esse*.

The suit instituted by the Respondents Peter Count D'Alton and Rosalie his wife, came on for hearing on the 18th June, 1817, when, with the con-

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sent of the Respondents, Evan Lloyd and Lady Trimlestown, it was ordered, that they the last named Respondents should commence a feigned action in the Court of King's Bench in Ireland, against the Appellant, with the usual further directions, in order that a trial might be had between the parties by a special jury of the county of Dublin, at the bar of the Court, during the sittings at the then next Michaelmas term, to try the following issue, viz. "*Whether the paper-writing, bearing date the 8th December, 1812, in the pleadings mentioned, be the last will and testament of Nicholas Lord Trimlestown, deceased, or not.*" And it was further ordered, that the Respondents Peter Count D'Alton and Rosalie his wife should be at liberty to appear in the action to defend their rights and those of their children, the Respondents Edward D'Alton and Richard D'Alton.

On the 6th June, 1818, the Lord Chancellor of Ireland made an order, entitled in the three causes, that the parties to the issue should be at liberty, on the trial of such issue, to make use of the depositions made by the witnesses examined abroad by them respectively, on commissions issued for that purpose.

The issue came on for trial on the 11th of June, 1818, in the Court of King's Bench, before Lord Chief Justice Downes, and Judge Mayne, and a special jury of the County of Dublin, and counsel appeared as well on the part of the Respondents Evan Lloyd and Lady Trimlestown, as of the Respondents Peter Count D'Alton and Rosalie his wife. The trial continued for fourteen days, when the jury not agreeing upon their verdict, *a juror was withdrawn* by consent of the Plaintiffs and Defendant in the issue.

On the 21st November, 1818, the Respondents made an application to the Lord Chancellor of Ireland for a

new trial of the issue, and thereupon it was ordered that the new trial should be had at the bar of the Court of Common Pleas in Ireland, *by a jury of the County of Dublin*; but before the order was drawn up the *venue* was changed on the application of the Appellant, and it was ordered that the new trial should be had before a jury of the county of Kildare.


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On the 22d February, 1819, the issue came on to be tried in the Court of Common Pleas, before Lord Norbury, Mr. Justice Fletcher, and Mr. Justice Moore, and continued on trial from that day until the 6th day of March, 1819, when the jury after having retired for twenty-eight hours, brought in their verdict, "*That the paper-writing of the 8th December, 1812, in the pleadings mentioned, was not the last will and testament of Nicholas Lord Baron Trimlestown, deceased.*"

After the trial, Henry Eustace married Henrietta D'Alton, and claimed the legacy of £5000 given to her by the will.

The Respondents, being dissatisfied with the verdict, gave notice, on the 7th May, 1819, of moving for a new trial, on the ground, first, of inadmissible evidence having been received on the part of the Appellant; secondly, of the Judges who presided having misdirected the jury at the trial; and, thirdly, on the ground of such verdict having been given contrary to law and the weight of evidence.

The motion came on to be heard upon the 7th of July, 1819, when the Counsel for the Respondents required the Lord Chancellor to call for the full report of the Judges who presided at the trial; but his Lordship was pleased to declare his intention to call for the notes of the learned Judges as far only as respected the objection made by the Respondents' counsel as

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to the admissibility of the evidence given by Edward Jerningham, and John Joseph Dillon, on the trial. The Lord Chancellor declined calling for any further report from the learned Judges than that before mentioned, *and stated as a further reason for such his refusal, that he had conferred with the three learned Judges before whom the issue had been tried, two of whom (Mr. Justice Fletcher and Mr. Justice Moore) expressed their entire approbation of the verdict, and the other (Lord Chief Justice Norbury) stated that he saw no good reason for granting another trial.*

On the 14th day of July, 1819, the motion upon argument was refused.

The Respondents appealed to the House of Lords from the last mentioned order, and contended, that such order ought to be reversed, principally on the grounds, first, that the Judges who presided at the trial had admitted the evidence of Edward Jerningham and John Joseph Dillon, and had dwelt upon it in their charge to the jury; and, secondly, that the Lord Chancellor ought not to have refused their motion for a new trial, without having previously called for and read the Judges' report of all the evidence given on the said trial.

The appeal was heard on the 29d of June, 1823, when the House declared, that *not having before them, in a case in which a feme covert and infants were parties materially interested, any report which they could deem authentic of all the evidence given at the trial, the Lords were unable to determine whether the verdict complained of by the motion for a new trial ought or ought not to be deemed conclusive:* and therefore the order of the 14th July, 1819, complained of in the appeal, was reversed; and the cause was

remitted to the Court of Chancery in Ireland, to rehear the motion for a new trial, upon a full report from the Judges, of the whole evidence given at the trial before them; the Lords *deeming such report necessary in a cause in which such parties were interested.*

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The Respondents accordingly, on or about the day of 1824, gave notice of a motion, and also petitioned the Lord Chancellor of Ireland, to set aside the verdict, on the grounds of inadmissible evidence having been permitted to be given on the part of the Defendant, the misdirection of the learned Judges who presided at the trial, and that such verdict was given contrary to law, and the weight of evidence; and also grounded on the learned Judges' reports of the whole evidence produced on the trial, and the order of the Lords. Whereupon the Lord Chancellor called upon the Lord Chief Justice of the Common Pleas, and Mr. Justice Moore, the two surviving Judges who presided at the trial of the issue, to furnish him with a copy of their notes of the evidence given on such trial; and the two surviving Judges accordingly delivered copies of their notes to the Lord Chancellor.

The motion was heard on the 26th April, 1824, and was debated on that and the five following days, and it came on again on the 24th May following, when the Lord Chancellor ordered, that the verdict found on the trial in the Court of Common Pleas, on the issue formerly directed, should be set aside; and that the issue directed by the order of the 18th June, 1817, should be varied; and his Lordship further ordered, that the issue to be tried should be, "Whether the
" paper writing, bearing date the 8th December, 1812,
" be the last will and testament of Nicholas Lord
" Trimlestown, deceased, or not; *and if not, whether*

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“any and what other paper writing or writings is or are his last will and testament.” And his Lordship further ordered, that such issue should be tried at the law side of the Court of Exchequer in Ireland, at the sittings after the then next Trinity Term, *by a special Jury of the county of the city of Dublin*, and that the Plaintiffs in the issue should pay to the Appellants the costs of the former trial in the Common Pleas.

Against this order the Appeal was presented.

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For the Appellants, *Mr. Horne, Dr. Lushington.*
 For the Respondents, the *Attorney General* and *Mr. Scarlet*, (and *Mr. Parry.*)


The Lord Chancellor^a.—There are in truth two issues.

In this state of the record on the trial, what other paper or writing was there to form the subject of a distinct issue?

This House may arrange its proceedings in such manner as is convenient and just. What occasion is there for us to trouble ourselves with the question, whether that will which was the only will on which the order was made is a will or not, or what ought to be the verdict with respect to that will: if you mean to say there is some other will or paper, which might supersede the necessity of trying whether that will which is to be mentioned in the present order ought to be considered as a testament at all. What is the other will or paper which this second order of the Chancellor

^a The judicial observations above reported occurred in the course and arose out of the argument, the substance of which is, in some instances, shortly incorporated with the observations. In some instances where they appear connected in the report, they were in fact separated by intervals of argument. The arguments themselves could not conveniently be reported on account of their length.

refers to? If there is any other will or paper to set up, could that be the right issue? If the appeal from this order goes to the whole contents of it, and this order is wrong in directing the other issue, then it must be sent back again.

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What other will or paper is meant to be referred to in this second order we do not know. The House may confine the objection to the issue, for the present to the point that there is no other paper or will referred to in the pleadings, and that therefore this second issue cannot be right. The Appellant would then have a right to ask that the cause should be remitted, unless this House was to confine the trial of the issue to what was the matter to be tried on the issue first directed; and then if there be any other will or paper which can be set up, we ought to know what that is. To authorize the direction of a new issue, there should be a petition of rehearing to vary the decree.

Lord Redesdale.—I have a suspicion that there is a mistake in framing this order. Upon the former appeal one doubt suggested was this, whether supposing that the evidence would have the effect of destroying the instrument which was then produced, so far as Lady Trimlestown took interest, it could have the effect of destroying the instrument, so far as the Countess D'Alton and her family took any interest under it; that was one important part of the case on the former hearing. The Jury found generally against the will. The evidence, as far as it appeared before us, was, that the will, had been obtained by the influence of Lady Trimlestown. But it does not follow, although the influence of Lady Trimlestown has given her a certain interest under the will, which the heir at law has a right to contest, that therefore the disposition contained in the will, so far as it related

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to the Countess D'Alton and her family, could be impeached ; and if there is no other instrument mentioned in the pleadings, I should rather suspect that this was intended to embrace that case ; but it does not do it ; and upon the motion for the new trial of an issue which had been directed by the decree, I should have had a doubt whether a new issue could be directed without a petition for a rehearing.

The Lord Chancellor.—In strict practice, it could not ; sometimes parties are not turned round on such an objection : but if the object of the Lord Chancellor in Ireland was such as the late Lord Chancellor of Ireland^b supposes, the issue is wrong, because then it ought to be whether the whole of the paper or what part of it contains the will of Nicholas Lord Trimlestown.

The House has a right to know (if it is open to a question whether only a part of the order is wrong) on what ground that part, with reference to which we have never had in any record that has been before us, any ground whatever for directing it, on what ground the Court directed that latter part of the issue. We are not to go into a long examination whether the Jury were right or wrong upon the issue as it stood before, but why the new matter is now introduced. I take it to be clearly within the competence of the House to say, that unless it be for the convenience of parties, they will not suffer the issue to be altered.

Lord Redesdale.—The Jury might have found on the former issue, that so much of the will as related to Lady Trimlestown was not the will of Lord Trimlestown, but that so much of the will as related to the Countess D'Alton and her family was the will of Lord Trimlestown.

^b Lord Redesdale.

I remember a case where the Jury found that the whole of the will was not the will of the testator. It was a case in which Lord Erskine particularly exerted himself. The person who framed the will had introduced himself as the ultimate devisee; the Jury found the rest of the will to be the will of the testator, but that ultimate devise which the person who framed the will had inserted they found not to be his will. So here if what is meant to be argued is this, that this disposition in favour of the Countess D'Alton may be good, and the rest may be bad, the Jury might have found a special verdict.

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If the parties interested are all adult, and waive that part of the order, the question will then be open upon the will alleged, whether the verdict ought to have been special with respect to a part of the will, and negating the rest.

The Lord Chancellor.—We are still under the difficulty, whether the record in the Court of Chancery authorizes the issue.

If there are a dozen other wills, this is an issue on the other wills. If the issue had been whether this was his last will and testament or not, there was no occasion for any other issue, if you intended to shew that by a subsequent will made, he revoked that will, because that would enable the Jury to find a verdict negating the validity of that will.

If it is a prior will, the latter part of the order has nothing to do with it, unless there appears to be some equity arising out of the record in the Court of Chancery, with reference to which a prior will being established, that Court would give some relief.

A question arose respecting the costs of a former

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day of hearing, which had been paid by the Appellants to the Respondents.

The Lord Chancellor.—There should be no costs of the day; for if this decree as it now stands cannot remain without some steps being taken to get rid of the additions, that would be a ground for allowing at once the present appeal. I think the Appellants should not pay the costs of the day under the circumstances^c.

The issue is directed, Lady Trimlestown being the Plaintiff and the two D'Altons are to appear on their own behalf and on behalf of their issue. Does it appear from the Judges' notes whether this separate and distinct question was ever agitated before the Jury, namely, whether supposing this will to be bad with respect to Lady Trimlestown, it might not be good as to several parts of it as to the others?


Lord Redesdale.—The Judges in their report do not state any thing about the directions which were given to the Jury.

The Lord Chancellor.—There do not appear to be decrees in any of the other cases, and the issue is directed in a case which among the three cases would certainly not be the one in which an issue would be directed here.

Lord Redesdale.—As I apprehend the verdict, it has found that it was not the intention of Lord Trimlestown to make any provision for his daughter or her family, or to make any provision for the payment of his debts out of the real estate, or to make any limitation in strict settlement of his estates to his son for life, his grandson for life, and so on limiting the estates over to the persons who were to succeed to the

^c The costs were repaid by the Respondents to the Appellants.

title of Trimlestown. That all those provisions formed no part of the intention of Lord Trimlestown, at the time when he executed that instrument. That seems to be the result of what has been done.

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The Lord Chancellor.—There was a case on the western circuit, I think at Winchester, where a gentleman made his will, and the attorney who drew it, took good care of himself; for after leaving several legacies and some small bequests to other persons, he left all the residue of the real and personal estate to himself. The direction given by the Judge (whether right or wrong is another thing), was this, “you are to consider whether that part of the will is fraudulent, but it does not follow that if it is so, all the rest of the testament may not be confirmed.” Does it necessarily follow in this will that all the provisions of 1812 are void, if the provision for Lady Trimlestown is void?

Dr. Lushington.—I am prepared to argue that those circumstances which have shewn it not to be Lord Trimlestown’s will, *quâ* Lady Trimlestown, all bear upon the other devises and bequests in the will, and shew that it was not Lord Trimlestown’s will, *quâ* the Countess D’Alton and the other legatees.

The Lord Chancellor.—It is capable of being so made out; but the question is, whether that way of considering the case was ever put to the jury; because if it has not been so put to the jury, the case has not been tried.

There must be a mistake in this point: if it was right to direct an issue in which Lady Trimlestown was Plaintiff—certainly another should have been directed, in which the Countess D’Alton was Plaintiff.

Lord Redesdale.—You begin your evidence

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against the will, by producing testamentary instruments as the wills of the late Lord Trimlestown, by which he makes provision for these very persons, and by which he limits his estate in strict settlement. Now the effect of this verdict is to say, that it was not the intention of Lord Trimlestown to make these provisions or to dispose of the estate in strict settlement, as averred by that instrument.

The Lord Chancellor.—The trial of the issue in that case could not be considered binding on the other parties, there being a great many infants concerned.

Lord Redesdale.—Had the evidence produced any thing to do with the question, whether the D'Altons were to have this estate.

The Lord Chancellor.—I think it may be argued, that the conduct of Lady Trimlestown vitiates the whole will; but whether it does or does not, it is material to know, whether Lord Norbury or Mr. Justice Moore put to the jury upon the trial the question whether, if the whole of the will was not good, any part of it was?


The question is, whether they should not have taken care that this should have gone in some shape to the jury.

Lord Redesdale.—If this cause should come on to be heard in the Court of Chancery after the verdict, what is to be done?

The Lord Chancellor.—We are sitting as a Court of Equity, and we cannot, as a Court of Equity, try the question relative to this will; and the consequence is, that if the questions embodied in the case, have not all been put to the jury, we have not yet got the opinion of the jury upon the questions or their finding, with respect to which alone we can

give any authority. It comes to be a very material question, whether there might not be an issue tried as between the D'Altons and the son?


Lord Redesdale.—The issue directs that Lady Trimlestown shall be the Plaintiff; how could the verdict in this issue be a ground for dismissing the Countess D'Alton's bill? The order gives liberty to the Countess D'Alton and the husband to appear by counsel to defend their rights, and those of their children under this will.

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The Lord Chancellor.—Supposing the evidence against Lord Trimlestown's intention be conclusive, every individual who claims under the former will, has a right to file a bill to set that will aside, they not being parties in this suit

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Suppose a new trial is granted, and Lord Trimlestown has the title as heir at law (whether it would be necessary to claim as such, is another thing): But, supposing he could claim as tenant for life under a former will, which former will is not capable of being effectually attacked, if Lord Trimlestown has filed this bill, making himself the sole party to the agitation of the question, whether the will of 1812 is to stand or not, if it should turn out upon the new trial that Lord Trimlestown is beaten, what is to prevent the persons claiming under the former will, to entertain a suit? Lord Trimlestown in his bill does not rely upon the testamentary papers; but if we are to argue upon some of the testamentary papers as being authentic, and shewing the testator's intention, then we are in truth setting up further papers as evidence of the will of 1812; whereas if it can be effectually done, it ought to be by other evidence, on the papers themselves being first proved.

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Lord Redesdale.—It is singular that upon a bill where the D'Altons are Plaintiffs, Lady Trimlestown should be made the Plaintiff in the issue ; but this extraordinary thing also occurs, that Lord Trimlestown is the Defendant in that bill, in the character of heir at law, and in this character gives in evidence that which is to deprive him of that character, and which is not impeached.

The Lord Chancellor.—We have no copy of Lord Trimlestown's bill. The issue is directed in the cause of *D'Altons and others v. Lord Trimlestown* ; although this is to decide that which is to arise in three causes, we have no bill here except the bill in which the D'Altons are Plaintiffs.

On what principle were depositions taken in the other causes, to which some of the individuals were not parties, ordered to be read ?

Mr. Horne.—There was an order for it, and that order never appealed from.


The Lord Chancellor.—It is not appealed from certainly.


This view of the case is extremely material, that whatever our decision might be, you cannot get through upon this state of the record.

With respect to the depositions taken in the other causes, and ordered to be read upon this trial, how can we sanction that against the infant daughters ? How is it possible to proceed ? We have no record upon the table, except the bill of Countess D'Alton and the answer of Lord Trimlestown ; the consequence is, that it is next to impossible to judge whether evidence was not given at *nisi prius* which could not be given against all the parties. The bill in the D'Alton cause is originally filed by the wife only and the Kemmis's, the infant D'Altons being

made Defendants. After Lord Trimlestown's answer is put in, the bill is amended (under what authority I cannot tell, nor is this circumstance taken notice of at all in the printed cases,) by striking out the two infant Defendants, and making them Plaintiffs, claiming interests under this will jointly with their mother. After they are made Plaintiffs, and altering the nature of the demand made by the bill, there is no answer put in by any body. Now what we are to do, regard being had to these parties, I know not. We cannot take upon ourselves to do that which a Court of Equity cannot do: what are we to do with this cause, looking at it as matter of precedent? I cannot at present, though I struggle to do it, see how the difficulty can be overcome—how, consistently with this record we can come to a decision. I am anxious to take care that the House should not establish a precedent, which it is its positive duty not to establish. The records are extremely material to look at, to see whether we can let this verdict stand, even if we thought it was right. Lord Norbury says the codicil of 1812, is admitted to be a good testamentary paper. If so, how can we conclude the rights of parties under it?

There have been cases in the Courts below, where a person putting in an instrument containing provisions for others, intended it to be only a colour for his deriving a benefit to himself, which he fraudulently seeks by the means of that instrument. Where that has occurred, the Court will not let any part of it stand; but have the courts gone so far as this? Supposing this instrument was improperly obtained on the part of Lady Trimlestown, if there happened to be in it provisions for other individuals, but on account of her conduct the will as it regards her is rejected, does

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that extend to the testamentary dispositions to other persons?—Was there ever a case in which such provisions were held bad as to others?

Mr. Horne.—The question on that point has been a good deal discussed lately in *Powell v. Muchett*.*

The Lord Chancellor.—The infants being originally Defendants, and afterwards being made Plaintiffs, by amending the bill, if they had a demand under the will as Plaintiffs, could the original Plaintiffs (as it appears they have done,) waive a further answer, which might have been for the benefit of the infants?

Lord Redesdale.—There is no common interest between the parents and the children: the two Mr. Kemmis's were struck out as Plaintiffs, and the children were inserted.

The Lord Chancellor.—The date of Lord Trimlestown's answer, and the date of the amendment of the bill, proves decidedly that Lord Trimlestown's answer was put in before the bill was amended. When those infants were made Plaintiffs, their interests were very much neglected. There ought to have been something more than their being put into the bill. Mr. Kemmis is struck out, and there is a term vested in him for raising an annuity to Lady D'Alton; and I should have thought him as material as any one could possibly be to the suit. If it became necessary to make a decree to raise that annuity, how was that to be done without Mr. Kemmis?

Lord Redesdale.—Several orders, and particularly

* 6. Mad. 216. But the discussion does not appear in the Report.

an order under which the depositions were used at the trial, was made in the three causes.

The Lord Chancellor.—The trial was had, this order of the 6th of June, 1818, in three causes, directing what sort of evidence was to be produced. In those three causes did all the Defendants put in Answers?

Mr. Nolan.—It appears that every one of the persons who are made Defendants in these several Bills, put in their Answers.

The Lord Chancellor.—Then why have you not their Answers? Where persons are suing for themselves and for the interest of infants, it will not be considered satisfactory if counsel do not take objections which they ought to have taken, because they apprehend the Court is bound to object on the part of the infants.

Lord Redesdale.—A Court of Law could only obey the order. Here Lady Trimlestown was the Plaintiff in the issue, and the other persons were no parties to the issue.

Mr. Horne.—It is ordered, that the Plaintiffs, Peter Count D'Alton and Rosalie Countess D'Alton his wife, be at liberty to appear in the action.


Lord Redesdale.—What right had the Court to make such an order? What is to be done? The case being in the Court of Chancery, if the verdict was not impeached, there could be no motive for a new trial. What is the Court of Chancery to do? There is error on the face of the decree.

The Lord Chancellor.—The effect of the order as to depositions, appears to have been utterly mistaken. It was considered as an order, that put upon the parties a duty to produce these depositions, whether the depositions would be evidence or would

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not be evidence; whereas the order is neither more nor less than the liberty to offer in evidence depositions without reading the Bill and Answer, and all the proceedings which are usually read in order to introduce them.

Mr. Horne.—The depositions read at the trial, were not the depositions of witnesses examined in the Court of Equity when the cause was in hearing, but depositions taken upon a commission issued subsequent to the decree.

Lord Redesdale.—If the cause should go back in the state in which it is without any alteration, what is the Court of Chancery to do? It cannot dismiss the Bill.

All the proceedings have been so irregular, that the Court could do nothing upon it. It ought to order the cause to be set down again. Is this order which directs an issue a decree?—is it not interlocutory?

Mr. Horne.—There was, as I collect from the papers, a regular decree in the cause of the Countess D'Alton, which directed the issue.

Lord Redesdale.—The prayer of the Bill is, that the will may be declared well proved and so on; the order being in the nature of an interlocutory order, if the cause comes on afterwards, the Court must judge whether that order tries the merits of the cause.

The Lord Chancellor.—The word decree happens to have got into the order; but looking at that part of the order which directs, that although publication has passed, they shall be at liberty further to examine witnesses, it appears to me impossible to say it is a decree before witnesses examined. That order for examination of witnesses after the issue directed must be by consent, and there was no consent here.

If there is no decree, the infants, or the persons

who have the care and custody of the infants, seem totally to have forgotten to inquire whether, if they could not claim a benefit under one will, they might not under another, as they could under any paper of the Testator that might have been brought before the Court, and ought to have been brought before the Court.

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Lord Redesdale.—This order puts the management of the issue in Lady Trimlestown and her husband. They are to strike the Jury, and so on. All that is said with respect to the Countess D'Alton is, that she might be at liberty to attend at the trial. Now Lady Trimlestown being made the party Plaintiff in the issue, a great deal might be evidence against her on the trial of the issue, which would not be evidence against the D'Altons or any other party.

The Lord Chancellor.—A person meaning to commit a fraud for his benefit, might have constructed such an instrument, that the fraud should defeat the whole of the provisions of it, though some of them were made for other persons. But if it happens that the instrument does not make new provisions, but only repeats provisions which had been made in good antecedent testamentary papers, then the fraud may have introduced that, which, if it is objectionable as it regards A., may not affect every thing that is to be found in that paper.

Lord Redesdale.—At present the judgment on the trial of the issue is against Lady Trimlestown; but if the D'Altons had been Plaintiffs in the issue, they might have thrown Lady Trimlestown over board. Evidence merely to affect Lady Trimlestown, and not the D'Altons, makes the trial of the issue a totally different thing.

The Lord Chancellor.—In that case, which was

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tried at Winchester, where the real estate, if it passed at all, passed by the residuary devise, Mr. Justice Buller, who tried the cause, was of opinion (right or wrong), that an attorney making himself the residuary devisee, was a fraud; which was going a little too far. In the trial of that case, nobody disputed that the other parts of the will were good, and the Jury found that he did not devise the residue of the estate; that the residuary clause was not part of the will. I do not mean to give any opinion here as to what would be the effect of putting a case of that sort in that way, but it appears to me that the trial was neither properly directed nor properly conducted; unless on the part of some of the persons who were at liberty to attend this trial, the question was either directly or actually put in that way.

Lord Redesdale.—The name of Mr. Kemmis was not struck out of the bill until the 6th of December, 1817, and the order directing the issue was the 18th of June, 1817. By the subsequent order of 21st November, 1818, the issue was supposed to be affirmatively upon Lady Trimlestown.

The Lord Chancellor.—Can any man take upon himself to say, that the D'Altons could not have claimed an interest under some of the former papers?

Lord Redesdale.—The order of the 21st of November, 1817, varies from the order of the 18th of June, 1817.

The Lord Chancellor.—The paper of August, 1812, Lord Norbury reports to be a good testamentary instrument. The passage I allude to is this:—"Here at the desire and admission of each side, several letters were proved or admitted to be read at each side, to which letters I must refer your Lordship as the best interpreters of them-

“ selves, as well as of the competency or incapacity,
 “ if any, or the failure of the intellect of the testator,
 “ and the object of his intentions : on which letters
 “ many ingenious observations were made by coun-
 “ sel at both sides in this peculiar and protracted
 “ trial during many days, and embracing every part
 “ and transaction of the testator’s life, from 1797 to
 “ his death in 1813, during which period it was ar-
 “ gued by counsel for the Plaintiffs, that he mani-
 “ fested increasing anxiety upon the subject of his
 “ testamentary dispositions, as actuated by his va-
 “ rious views and impressions of vicissitudes and
 “ changes (most of them towards the latter period
 “ of his life), arising from new occurrences in his
 “ affairs and new properties devolved upon him, all
 “ of which were urged with pointed observations on
 “ the codicil of the 2d August, 1812, &c., which was
 “ not impeached during the trial, but undisputed and
 “ admitted as a testamentary disposition of testator.”
 According to Lord Norbury’s description, he thought
 the testator capable of judging what he was about
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The Lord Chancellor.—There are no parties to
 this appeal except Lord Trimlestown and Mr. Lloyd.
 Neither his son nor the D’Altons are named in
 the appeal. Lord Trimlestown put in his answer
 in the cause, on his own behalf and in behalf of
 his son, but *the son is no party to this appeal*.
 If the son is of age, he should be made a party
 to the appeal. Lord Trimlestown is only tenant
 for life under the will ; it could not be competent
 to him to consent as against his own issue. How
 can we make an addition to the order directing a
 new trial upon an appeal which brings nobody before

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us but Lord Trimlestown himself and the Lloyds? How can we possibly do that, having no other Appellant or Respondents than those who are now here?


Lord Redesdale.—There are inaccuracies in the whole proceeding. Evidence was admitted upon the trial under the order made in the three causes, the issue being conducted in only one, and the order could not possibly have been made in that one cause.

The Lord Chancellor.—Those who are the parties upon this issue were parties in those several cases. But that does not help the imperfection, because, besides the circumstance that the order was made when the persons who were parties in those causes were infants, the Court could not order evidence to be read against parties in whose cause the evidence was not taken.

Mr. Parry.—The same evidence was taken in each cause. The Abbé O'Dwyer was examined, for instance, in each cause. Commissioners went from Ireland to France, where they examined him.

The Lord Chancellor.—That does not appear in our proceedings. • It is clear that if they had been made parties to the issue, considering that one was a married woman and that the others were infants, the Court here would have directed those points to have been made at the trial, about which not one word was said. To bring here the necessary parties, you must present another petition calling them here. Suppose a creditor files a bill against Mr. Kemmis, who has been, for some reason quite unintelligible to me, dismissed as a party to the suit: if any creditor or any legatee, under the last will of Lord Trimlestown, were to file a bill for his debt, or for his legacy, would such creditor or such legatee be bound by that issue?

The Attorney-General.—Any creditor might try it again; but in cases of this sort, it is not matter of necessity for the Court to have before them every possible party who might meet the question again.


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The Lord Chancellor.—It certainly is not; but it is extremely material, if you are trying a question before a jury, with respect to the validity of a will, to take notice that the testator has, as we are apt to say upon these occasions, not gone into his grave without taking care of his creditors. It may turn out upon inquiry, that it is impossible to make this will valid with respect to the Countess D'Alton, if it is not valid with respect to Lady Trimlestown; but whether it be so or not, in my judgment the Court of Chancery ought to have ordered the counsel of this married woman and these infants, distinctly to take the opinion of the jury upon the issue, and to make objections to the admission of a great deal of evidence, which appears to have been admitted. Suppose Lord Trimlestown had succeeded in the ejectment prayed by this bill, would that ejectment have prevented any other person from trying the validity of this will?

Lord Redesdale.—As to all the interest taken by persons entitled to the remainder, it is impossible that the Court can do any thing in this suit. If it were to come before the Court upon this verdict, the Court could pronounce no order.

The Lord Chancellor.—Lord Trimlestown is only tenant for life, and therefore the first tenant in tail in remainder ought to be a party to this appeal.

Lord Redesdale.—The whole proceeding is irregular from beginning to end. I see that Lord Trimlestown insists by his answer to the Countess D'Alton's

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bill, that the bill is not Countess D'Alton's, but Lady Trimlestown's, and they have proceeded upon that issue to try this question, with Lady Trimlestown as the Plaintiff in the issue.

In order to do justice in this case, all the parties interested in the different instruments, ought to have been before the Court, and the Court ought to have directed an issue to try whether any and which of the instruments, or any and what parts thereof, were the will of Lord Trimlestown.

The Lord Chancellor.—The House cannot do that upon these pleadings, because these pleadings take no notice of any antecedent will at all.


We should probably have no objection to the cause standing over, with liberty for you to make any application to the Court of Chancery in Ireland, but whether you will find, regard being had to the state of the record, that the Court of Chancery can do any thing, is another matter.

Lord Redesdale.—Lord Trimlestown upon the pleadings in this cause, stands in the case of an heir at law, insisting that his father died intestate, and the evidence he produces upon the trial of this issue, is that very testamentary act, which he says is to be regarded as shewing the intention of his father.

The Lord Chancellor.—The bill on his part, contends for an intestacy, and yet his infant son appears by him to claim a life estate under this very will.

Lord Redesdale.—The justice of the case never can be attained in the suits as they are framed, and certainly not in the one suit. If it can be effected at all, it must be in the three suits. An order has been made in the three suits on which evidence was

admitted at the trial, and this alone is such an irregularity that it is impossible the Court can decide upon the merits of the case.

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The Lord Chancellor.—The Judge at Nisi Prius informs the Court that divers wills have been given in evidence, whereas Lord Trimlestown is proceeding in this case as if it were an absolute intestacy.

Lord Redesdale.—It is impossible in this case to do any thing, for the issue is directed only in the one cause. It is clear from the evidence upon which the Jury have proceeded that that cause cannot try the merits between the parties, and consequently that when the cause comes on upon this verdict, the Court can make no order.

The Attorney-General.—If there were a remit to the Court of Chancery, in Ireland, would it not be possible to direct an issue in the three causes with the intervention of those parties who claimed separate interests; for instance, Lord Trimlestown's son may be permitted to raise a separate question upon the will.

Lord Redesdale.—There are not the proper parties before the Court.

They must not only amend the order directing the issue, but they must amend all the pleadings in the cause. They must make it a new cause.

The Lord Chancellor.—If the Lord Chancellor, when he directed an additional issue, had been asked upon what part of the record in those causes he made the addition, in all probability he would have found out that he could not do it upon any part of the record.

Lord Redesdale.—Supposing the verdict to be in favour of the will, excepting the dispositions in favour of Lady Trimlestown, the effect will be, that all the

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prior wills (and the interest of Lady Trimlestown under them) will be revoked by this will; so that it seems to me, that the justice of the case never can be come at but by an issue, directing the jury to try whether any, and, if any, which of the instruments that have been brought forward in this cause, and what parts of them constitute the testamentary disposition of Lord Trimlestown;—then the jury would have the whole case before them; and they must find what was the will of Lord Trimlestown, and what was not the will of Lord Trimlestown.

If you act upon this proceeding only, you must dismiss the bill; which you have no right to do.


The Lord Chancellor.—Suppose it turned out that there was another will, could the Court of Chancery make any decree in the present state of the record?

Lord Redesdale.—The Court must see that upon the trial of this issue, the merits have not been tried supposing the verdict was right. The justice of the case would be met by an order, referring it back to the Court of Chancery, to review all the proceedings, with liberty for the parties to reform those proceedings in such manner as shall bring the rights of the parties properly in discussion before the Court.

There is nothing so important in the administration of justice as regularity of proceeding. Wherever there is irregularity in the proceedings, it always tends to a bad administration of justice, or to injustice.


The Lord Chancellor.—The question is, what the House can do. We are in this situation:—if we say there shall be a new trial, and there is a new trial, in the present state of the record the verdict upon that new trial will be in the same situation as the present is.

If this house were to reverse the Lord Chancellor's order, and to say there should be no new trial, and the cause were to proceed, and the Lord Chancellor were to make a decree in consequence of that verdict, that decree would be the subject of an appeal here, and then we should say that upon this state of the record no such decree could be made.

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Lord Redesdale.—It appeared in the evidence in this cause that several instruments were executed by Lord Trimlestown for testamentary purposes, and a Bill was filed by the Countess D'Alton, for the purpose of having that which was the last instrument alleged to have been executed by the late Lord Trimlestown, carried into effect in respect to her interests. In the course of the proceedings, before the case had come to that stage in which the Court had to pronounce a decree upon the subject, an order was made for the purpose of directing an issue to try the validity of the instrument thus alleged to have been the will of Lord Trimlestown. That was not a decretal order, but an interlocutory order, made in consequence of some application to the Court. There was also an application for the purpose of having a receiver appointed of the estates during the pendency of the suit.

The order was of rather an extraordinary nature. The plaintiffs in this cause in the Court of Chancery, were the Count and Countess D'Alton. The Defendants were Lord Trimlestown and Mr. Lloyd and Lady Trimlestown his wife, and the children of the Countess D'Alton. The issue directed was—not an issue in which the Count and Countess D'Alton were Plaintiffs, but an issue in which the Dowager Lady Trimlestown was to be Plaintiff, and the Count and Countess


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D'Alton were to be at liberty to appear and defend their rights. Upon this issue, which ought never to have been directed in such form, it appears to me to be impossible to come at the justice of the case, considering what appeared upon the trial of the issue so directed.

Upon the trial of that issue, several instruments were produced in evidence, which had been executed by Lord Trimlestown, from time to time, as testamentary instruments. The last instrument, that with reference to which the issue was directed, was impeached because it was an instrument executed under the improper influence of Lady Trimlestown, the wife of the late Lord Trimlestown, over her husband, in consequence of which it was said to be her will and not his will. That was the great point in discussion in the case. For the purpose of establishing that fact, a great deal of evidence was entered into, evidence applicable perhaps to an issue in which Lady Trimlestown was the Plaintiff, but if in this issue the D'Alton's had been Plaintiffs, it might have been exceedingly doubtful whether much of that evidence could have been given. Several instruments were given in evidence which had been executed by Lord Trimlestown, all of which made considerable provision for his daughter the Countess D'Alton, and the great objection to the last instrument was the increase of provision for Lady Trimlestown, far beyond the original intention of Lord Trimlestown, expressed in the first will which he had executed.

The result was, that upon the trial of this issue a verdict was given against the Plaintiffs. An application was then made to the Court of Chancery for a new trial: the Lord Chancellor of Ireland directed a new trial: and the cause came by appeal from that order of the Court to this House, but

without the information which was necessary to enable this House to form a judgment upon the subject; because there was not a sufficient report from the Judges of what had passed upon the trial. The cause was remitted therefore to the Court of Chancery in Ireland, for the purpose of obtaining the report of the Judges. The report of the Judges then came before the Court of Chancery: there had been three Judges at the trial at bar in the Court of Common Pleas; one had died in the interim; the other two, Lord Norbury and Mr. Justice Moore, stated what had been tendered in evidence, and it appeared that the opinions of the two learned Judges differed. Lord Norbury was of opinion that the verdict was not warranted by the evidence: Mr. Justice Moore was of opinion that the verdict was warranted by the evidence. Under these circumstances the Lord Chancellor of Ireland, after hearing counsel at considerable length, ordered a new trial to be had in the Court of King's Bench. This order of the Lord Chancellor of Ireland became the subject of appeal to this House, Lord Trimlestown insisting that a new trial ought not to have been granted.

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When the case came to be discussed before your Lordships, it appeared that it was impossible, whatever should be done upon the verdict upon that issue, to decide the cause. How could you, or how could the Court of Chancery below, make a proper decree with respect to the late Lord Trimlestown's property, upon an issue directed, in which the whole of the case, as it affected all the persons claiming under that will, was to be operated upon, by evidence which, though it might be admissible against the Dowager Lady Trimlestown, could not possibly affect the other parties. In this view of the case, when it came be-


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fore the House, and was heard by the learned Lord who then sat upon the Woolsack and those who attended, it appeared absolutely necessary to consider in what manner the cause should be put into such a shape, as that something effectual could be done. In the first place, this being an interlocutory order, if the verdict had been in favor of the Plaintiff, no decree could have been pronounced upon it. Upon the return of the verdict there must have been further proceedings in the cause, and all proper parties must have been brought before the Court, who did not appear to have been brought before the Court in the cause as it stood.

There were at the same time depending two other causes, one in which Lady Trimlestown and her husband were Plaintiffs, and the other in which Lord Trimlestown was the Plaintiff, and some of the orders respecting the trial of the issues, and the evidence which had been offered had been made in one of the causes and some in others of the causes; the consequence of which was, that there was what I do not know how to express by any word so appropriate as the word jumble. There was a jumble of the three causes, which made it extremely difficult to say how, in an appeal in one cause, you could take into consideration the effect of the trial of an issue, where part of the proceedings, and particularly with respect to the admission of some particular evidence, was had in those three causes. Upon the whole, therefore, it appeared to the noble Lord who then presided and myself, that there was no use whatever in proceeding in the cause as it then stood; that all which had been done might be considered almost as expence thrown away, and that it was necessary that the cause should be put in such a state, as that finally the Court of

Chancery in Ireland might be able to pronounce an effectual judgment, which judgment should embrace the rights of all the parties claiming under the will of Lord Trimlestown.

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It appears that Lord Trimlestown had made great provisions for different purposes. By this instrument, and I believe by every one of them, he had entailed the interest in what I should call the Trimlestown Estate, upon his son and upon his issue male in strict settlement, and he had entailed it upon the D'Alton's in remainder: he had made a different disposition with respect to another estate, the Barnewall Estate, to which he succeeded as the heir of Lord Barnewall. He had limited that estate with a view to its going (failing the descendants from himself) over to the Barnewall family, so that he had in view, unquestionably, in those different instruments a variety of objects besides Lady Trimlestown.

It was endeavoured upon the trial of the issues to connect, in some degree, the Countess D'Alton with Lady Trimlestown, and some of the evidence, which affected the Dowager Lady Trimlestown, affected also the Countess D'Alton. The evidence, however, on that subject was extremely slight: the Countess D'Alton had been unfortunate in her marriage, and had been therefore in a state of distress, and was living with her father, or dependent upon him, and she, in a letter which she had written to Lady Trimlestown, expresses her obligation to Lady Trimlestown for her kind interference, in respect of the disposition Lord Trimlestown had made in her favor and that of her children. But whatever effect that might have against the Countess D'Alton, it had none against her children.

It appears to me absolutely necessary that the

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cause should be put into some other course, so as to present the questions which arise upon the several instruments offered in evidence upon the trial of the issue, (which are very different wills and instructions for and drafts of wills and codicils, and so offered in evidence on the trial of this issue, for the purpose principally of shewing the progress of the influence of the Dowager Lady Trimlestown on the mind of her husband,) and to bring all those properly within the view of the Court. For supposing the last will to have been made under the influence of Lady Trimlestown, so as to affect it with reference to the large provisions made for her by that will, that could not possibly affect the dispositions made in favor of the rest of the family, so that the Jury, if they had conceived that that influence had been carried to an improper length, ought not to have found against the whole of the will. If, on the contrary, it appeared to them that the whole of that will had been improperly obtained, it then became another question whether the prior will was not to be considered as the disposition of Lord Trimlestown, that prior will appearing to have been regularly executed with a considerable degree of deliberation with respect to the dispositions contained in it. If that could be affected, still there was a prior instrument, and it was a question important for consideration, whether the whole were affected in the way in which it is conceived that the will last in point of date was affected by the supposed influence of Lady Trimlestown, and the intention of the former instrument would be considered as involved in the same fate; at least it was a matter to be left to the Jury. It was clear therefore to us, that the trial which had been had could not possibly be satisfactory, and that the verdict which


had been given was not one, if it was to stand, on which the Court could take any proceeding in the cause, for it was upon an interlocutory order, it did not preclude the parties from amending the Bill, and the whole was thrown into a state of confusion. As it appeared to us, therefore, there could be no end in directing a new trial upon this issue, as had been done by the Lord Chancellor of Ireland, or proceeding in any manner on the order made for that purpose.

Under these circumstances, I should propose an order referring the whole back again to the reconsideration of the Court of Chancery in Ireland, so that the whole case may be properly brought before that Court for its decision. It may be questionable whether the proper way of bringing the whole case before the Court for its decision, would not be by proceeding in the three causes, and bringing all the three causes together to be heard before the Court of Chancery, in one of which Lady Trimlestown is Plaintiff, in another Lord Trimlestown is Plaintiff, and in the one before your Lordships the D'Alton's are Plaintiffs. Those three causes might be brought on perhaps together, and upon those three causes being so united, such directions might be given as might try competently the rights of all the parties. Upon that point, however, it is not in your Lordships' power to give any direction—you can only make an order in the cause which is before you. I propose, therefore, to make an order, stating the opinion of the House with respect to the impossibility of doing complete justice in the appeal which is now before you: that you are of opinion that this cause ought to be referred back to the Court of Chancery for further consideration, in as much as it appears to your Lordships that having regard to all the

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circumstances to be collected from the several matters appearing in the Judges' report to have been offered in evidence on the trial of the issue directed by the order, the merits of the whole case, as affecting the rights of the parties in this cause, and of other persons interested in the estates of the late Lord Trimlestown, as claiming under or against the several instruments given in evidence in the cause, cannot be properly tried under such issue, and that therefore it is not fit that any further proceedings should be had under the order directing that issue, and that the parties interested should be at liberty to proceed as they may be advised, for the purpose of bringing before the Court of Chancery the question whether by all or by any one, and which of the said instruments alleged to have been executed by Lord Trimlestown, as testamentary instruments, or any and what part and parts thereof respectively, Lord Trimlestown did devise and convey all or what part or parts of his real estates, and in what manner and in and by what words, (my view in proposing that direction is that the Jury may find specially, if they shall think that a part of the instrument ought to be rejected and a part retained, and in that case that they may find what words in the will are the words which they ought to substantiate,) and that a proper issue or issues be directed by the Court, in such manner as to the Court may seem right, and in which all proper persons may be made parties.


It appears to me most extraordinary, that in an issue to try whether the Count and Countess D'Alton and their children had any interest in the estates of Lord Trimlestown, the deviser, Lady Trimlestown, whose conduct was the subject of animadversion, should be made the Plaintiff; and therefore, I

conceive that if the Court should finally direct issues upon the subject, it might be material to consider whether one or more issues should be directed, and also who should be the parties in those issues, so that a proper decision may be finally had upon which the Court may determine ; so that upon the verdict or verdicts that may be found upon the trial of those issues, the Court may be enabled to pronounce a decree respecting the rights of the parties in this cause consistently with their rights, and with the rights of all other parties claiming interests in the real estates of the late Lord Trimlestown. When a Court of Equity pronounces a decree carrying into execution the trusts in a testamentary instrument, it is necessary that it should be applied to the rights of every person interested.—Upon this issue you cannot apply it to the rights of every individual, there being several persons not named. For instance, if the rights of the Count and Countess D'Alton are to be supported, they are to be supported against the interest of the remainder man, whose estate will be charged for their benefit. If the instruments are to be considered as sustaining the rights of Lady Trimlestown, her rights will overrun, to a certain degree, the rights of the Count and Countess D'Alton and their issue as well as those of Lord Trimlestown. For such purpose it appears to me that you should declare your opinion that the Plaintiffs in the cause should be at liberty to amend their bill in such manner as they may be advised, so that they make their bill what it ought to have been originally, bringing before the Court all parties interested in the cause ; particularly there are certain trustees who are not brought before the Court, whom it may be absolutely necessary to bring before the Court ; and that

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you should order this cause to be referred back to the Court below for further consideration, the Court having regard to the several matters before expressed, and the further progress of this cause, in a manner which may be just and right. Having prepared three or four forms in which I thought the cause might be disposed of, I have at last, with the concurrence of the noble and learned Lord who presided at the hearing of the cause, conceived this shorter form would best answer the purpose of justice and leave the Court below at the greatest liberty, referring the whole back to their reconsideration, and suggesting at the same time why it was so referred back for their consideration, pointing out to them, as far as it is proper to point out to them, the difficulties which prevented your making any decision, except that of referring back to them the question, upon the appeal now brought before your Lordships.

It is lamentable that so much expence should be incurred in this cause—it is unfortunate that so little success should attend the efforts of parties to cut short a cause. But the farthest way about is often the nearest way home, and I think that this cause is a strong proof of the truth of that saying and of the importance of regularity in judicial proceedings, particularly in bringing all parties before the Court, and not attempting to save expence to parties by dispensing with that which is the proper and regular mode of proceeding. I believe it will be found that it would save considerable expence to the parties to follow the ordinary rules. Where the parties are disposed to abide by the event of a trial upon a simple question of fact, and whatever the decision upon that question may be, to abstain from further litigation, they being the only parties interested, their

object may in that mode be effected; but when a whole family are to be affected by the decree of the Court, as it must be in this case if the decree is carried into effect, the consequence is, that the Court must give directions to carry into execution all the trusts of the will, which shall be finally established as the will of Lord Trimlestown. In such a case, I believe no advantage is ever gained by attempting to take the shorter course instead of the longer one. I beg to move your Lordships that that which I have stated from this paper be the judgment of your Lordships.

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The Earl of Eldon.—I am most decidedly of opinion, that no verdict whatever that can be given upon the issue which was directed in this cause, can enable the Lord Chancellor of Ireland to give any such judgment in these causes as ought to be given. The consequence of that is, that we are placed in this situation, that if we either direct a new trial, or refuse to grant a new trial and leave the old verdict in subsistence, it is equally without avail. If we grant a new trial, we are granting that for a reason which, in my opinion, can operate nothing more than to create a vast additional expence, which can be of no use. The only thing, therefore, that the House can now do that can be useful, is to intimate to the Court why we think that this new trial, if it ought to be granted, should be in a form in which it can avail the parties, and upon that subject I will take the liberty of saying, that supposing the trial to have been properly directed, it appears to me that a great deal of evidence was admitted, the admissibility of which I cannot help considerably doubting, or rather going the length of denying. I am further of opinion, that a point was totally missed upon that trial, which I take to be extremely impor-

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tant, which is, that if there was a part of that will which, on account of undue influence, ought not to be considered as the testamentary instrument of the testator, it does not therefore follow that the whole of that will was to be condemned. We have a case* of that kind which was before Mr. Justice Buller, at the Assizes at Winchester, where the Jury found, that the residuary devise of the estate was good for nothing, on account of the conduct of the party who prepared the will, but the Jury found that all the rest was good; and a great part of this very will, even if one part is affected, on the ground of influence, may be confirmed, and may be as validly testamentary as any will that was ever made. So in the case* of Mr. Barnard of South Cave, the Jury determined that that which was presented to them contained the will of the testator, holding at the same time, however, that a considerable part of that which appeared upon the face of the will, was not any part of the will of the testator; and that points out the utility of the direction contained in this paper, that the Jury shall find in what words the testator devised; but, whatever may be found in an issue directed merely in this one cause, it is impossible that that verdict can regulate the rights of the parties in such a way, as that the Court of Chancery can give a proper direction in all these causes. The consequence of that is, that the Court must take into its reconsideration whether all the causes ought not to be heard together, and whether there ought not to be some amendment before the causes are heard together, so as to introduce all the points, which the Jury

* Diligent inquiry has been made as to these cases, but as yet without effect. Information, if obtained, will be inserted in a note at the end of the volume.

ought finally to determine; and I conclude with saying, though it is only a repetition, that if a new trial were granted upon this issue, let the result of that trial be what it may, if the proceedings in the Court of Chancery in Ireland are like our proceedings in the Court of Chancery in England, they may travel through a first trial and through a second trial, and the verdict which may be so obtained will be utterly ineffectual for the purpose for which it is required.

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Ordered and adjudged, that the cause be referred back to the Court of Chancery in Ireland, for further consideration thereof; inasmuch as it appears to this House, that, having regard to all the circumstances to be collected from the several matters appearing from the Judges' report to have been offered in evidence on trial of the issue directed by the said order of the 18th day of June, 1817, the merits of the whole case, as affecting the rights of the Appellant in this cause, and of all other persons interested, in the real estates of Nicholas Lord Trimlestown, deceased, and claiming under or against the several instruments produced in evidence on the said trial, cannot be properly tried on such issue, and that therefore it is not fit that any further proceedings should be had under the said order of the 24th day of May, 1824, complained of in the said appeal: but that the parties interested should be at liberty to proceed as they should be advised for the purpose of bringing before the said Court of Chancery the question, whether by all or any and which of the several instruments alleged to have been executed by the said Nicholas Lord Trimlestown, deceased, as testamentary instruments, or by any and what parts or part thereof respectively, the said Nicholas Lord Trimlestown, deceased, did devise all or any and what parts or part of his real estates, and in what manner and by what words, and that a proper issue or issues may be directed by the said Court in such manner as may be necessary, and in which all proper persons may be made parties, so that upon the verdict or verdicts which may be given on the trial of such issue or issues, the said Court may be enabled to pronounce a decree respecting the rights of the Appellant in this cause, consistent with his rights and with the rights of all other persons claiming

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interests in the real estates of the said Nicholas, Lord Trimlestown: And this House is of opinion, that the rights of the Plaintiffs in this cause cannot be properly determined, on the pleadings in this cause, as the same now stand: And it is further ordered, that this cause be referred back to the said Court of Chancery for the further consideration of the said Court, to the end that the said Court, having regard to the several matters hereinbefore expressed, may further proceed in the said cause in such manner as shall be just.

ENGLAND.

(COURT OF CHANCERY.)

RICHARD HEMING - - - - - *Appellant.*

THOMAS CLUTTERBUCK and EDWARD }
 EVANS - - - - - } *Respondents.*

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G. H., by a testamentary paper in the form of a regular will, naming executors and bequeathing the residue, bequeaths "to his wife 500*l.* sterling per annum for her life, to be placed "in and payable out of the long annuities, to stand in her name "and &c., (Trustees) and at her decease, to my father T. H. "for life, remainder to my cousin R. H., son of my uncle, "absolutely," &c. By a second testamentary paper, dated four months after the first, and beginning in the regular form of a will, but not naming executors, nor bequeathing the residue, the testator gives "to his wife so much money as "will purchase 500*l.* sterling per annum, in the long annuities "granted by government, the income thereof to be received "by her during her life for her own use, and at her death, "to my child or children for their own use and benefit "equally: in default of issue, then to my father T. H. for his "life, and at his death to go to my cousin R. H. absolutely," the principal to be in the name of &c. (wife and trustees).

Each of the testamentary papers contained a great number of legacies, and in a large majority of the bequests they were precisely in similar terms. In the case of two of the legacies given by the second will, the testator expresses that they are to be "in lieu of any other annuity he may have granted" to those legatees. This precaution is omitted in the case of the legacy to the wife with remainder, &c. The two papers were proved in the Ecclesiastical Court as one will.

Held in the Court below without doubt, that the second legacy was a substitution for the first. Held on appeal, that it was a case of great doubt and difficulty, but the judgment was affirmed.

THE question in this appeal arose upon the construction to be put upon two paper writings, dated respectively the 28th of May, 1780, and the 26th of August,

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1790,—the former marked as an exhibit in the Ecclesiastical Court with the letter F, and the latter marked as an exhibit in the Ecclesiastical Court with the letter G,—of which as constituting the last will and testament of George Heming, Probate was granted by the Prerogative Court to Thomas Ludbey and James Gurry.

These paper writings were in the words and figures, and written with the interlineations, and in the manner following:—

“F”

“In the Name of God Amen”

“I George Heming of Bond Street in the City of Westminster Goldsmith being of perfect mind and memory make this my last Will and Testament.”

“Imprimis I bequeath to my dear & faithful Wife Ann Heming Five hundred pounds sterling *P* annum for her life to be placed in and payable out of the Long Annuities And to stand in her Name and in the Names of my dear Father Thomas Heming my valued friend Thomas Ludbey & my worthy Kinsman James Gurry In trust for the use of my Wife for her life payable half yearly & at her decease to my Father Thomas Heming for his life remainder to my Cousin Richard Heming Son of my Uncle George Heming & absolutely for his use upon his attaining twenty five years of age if the forenamed Parties are dead, till that time in the same Trusts the parties interested to chuse a new Trustee upon the death of either taking place”

“To Eleanor Gurry Wife of the aforesaid James Gurry I bequeath Fifty pounds sterling *P*. annum for her life out of the Long Annuities and in the same Trusts as above remainder of the term after her death to the Children of Eleanor Gurry by James

Gurry share and share alike upon their becoming of age each Child to have their respective share transfer'd to them but the foregoing devise is not to take place except James and Eleanor Gurry do assign their share in an Estate called the Barrow to John Weaver and his Wife as is after directed in the fullest manner in their power"

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" To Jane Gilley and Benetta Gilley I do bequeath Fifty pounds *P. Annum* to each of them for life in the same Trusts as aforesaid, but in both instances the name of the parties intended to be benefitted to stand in the Bank Books with the Trustees and in case of the death of either Jane or Benetta the deceased Interest for the remainder of the term to go to my Wife absolutely and at her disposal but in case of her death previous then to Thomas or Richard Heming as before."

" To Catherine Gilley Two hundred and fifty pounds sterling provided she assign all her Interest in the Barrow to John Weaver & Wife And I recommend her to place it in the Long Annuities for her Life & convey it to her Children if any as she may be married for aught I know & if so I hope happily believing her deserving."

" To John & Mary Weaver I bequeath the share of James Gurry & Wife Catherine Gilley & the 2 shares I bought of Jane & Benetta Gilley And I request my wife will assign her Share in the Barrow Estate absolutely to John & Mary Weaver for their joint lives & at their decease to their Children equally But I recommend them to sell the Estate But if so they must place the Money in the trusts aforesaid, for the use of their Children at their death & when of age or forfeit this Bequest."

" To my Wifes 5 Sisters Fifty pounds each over &

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above all the foregoing bequests they giving up all papers they may hold respecting payment of Money especially Jane & Benetta."

"To my dear Wife my Estate at Edgeware absolutely as she seemed fond of it But request she never Build there to make a Residence knowing altho' she likes it now it would not be suitable for to reside at if she does not part with it I recommend it to be left to her to Richard Heming."

"I leave to Felix Vaughan Son of Samuel Vaughan Five hundred pounds in the same trust to the age of age then absolutely hoping he will be advised by my Trustees."

"I leave to Thomas Laver as some return for his Fathers faithful services Five hundred pounds in the same manner as I have done above to Felix Vaughan."

"To my respected friend Alex^r. Baxter Esq^r piece of Plate of One hundred Guineas value if he be alive at my decease."

"To Mary Mapletoft and Beatrix Peirce each one hundred Guineas for their sole use & benefit."

"To my dear Wife Three thousand pounds absolutely at her disposal & to her sole use."

"To my dear Father my share of Ingateston Estate & to him, Thomas Ludbey and James Gurr my three Executors Five hundred pounds each & likewise to my Wife all my Household Furniture Pictures & whatever I may die possess'd of, the residue and residue of all my effects appointing her to act as a Trustee in conjunction with the above named believing firmly she will benefit and shew kindness to all those she knew I esteemed or that were deserving—I likewise bequeath my esteemed Friend John Brewster Esq^r One hundred Guineas if his death take place previous to mine then equally to his Children."

"as to my Wife if she does marry again which I by no means disapprove of I hope she will gain one deserving her & that will esteem her as she deserves—only advising her to have her fortune settled upon her & her Children previous to Marriage—Witness my hand this twenty-eighth of May Seventeen hundred and eighty."

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"Geo. Heming."

"G"

"In the Name of God, Amen—Aug^t 26th 1780."

"I George Heming of Bond Street Goldsmith being of sound Mind & Memory do make & ordain this to be my last Will and Testament

"Imprimis I bequeath to my dear Wife Anne Heming formerly Anne Gilley so much Money as will purchase Five hundred pounds sterling *P. Annum* in the Long Annuities granted by Government & the Income thereof to be received by the said Ann

"Heming during her life & at

~~"her decease to be~~

"for her own use

Child or Children

"& benefit and at her death to my

"for their own use and benefit equally in default of Issue then to my

"Father Thomas Heming for his life

"and at his death to go to my Nephew

Richard Heming for the remainder of the term or absolutely at his disposal when the said Ann

and Thomas Heming are both dead the Principal at my death to be placed in the Names of

Ann Heming my Wife my dear Father Thomas Heming my valued friend Thomas Ludbey

and my worthy kinsman James Gurry In trust for the said Ann or my Children and Thomas

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Heming — during their lives respectively
 supposed at about” - - - - - 900

“ I bequeath to my Nephew Richard Hem-
 ming after the 4. following shares are pur-
 chased & assigned over to my Executors
 all the Estate called the Barrow in the County
 of Hereford” - - - - - 1000

“ I bequeath to John & Mary Weaver two
 hundred pounds provided they assign their
 share and right in the Barrow Estate to my
 Executors” - - - - - 200

“ I likewise bequeath to the said Mary
 Weaver Fifty pounds *P. Annum* in the Long
 Annuities for her life & at her death to the
 Issue of her Body by John Weaver in default
 of Issue then at her disposal” - - - - - 900

“ I bequeath to James and Eleanor Gurry
 in like manner two hundred pounds for their
 share in the Barrow Estate” - - - - - 200

“ I bequeath to Eleanor Gurry Wife of
 James Gurry Fifty pounds *P. annum* in the
 Long Annuities for her life and at her death
 equally to the Issue she may have by James
 Gurry in default of such Issue then at her dis-
 posal” - - - - - 900

“ To Jane Gilley I bequeath Fifty pounds *P.*
annum in the Long Annuities absolutely at her
 disposal in lieu of any other Annuity I may
 have granted to her” - - - - - 900

“ To Benetta Gilley I bequeath fifty pounds
P. Annum in the Long Annuities at her dis-
 posal in lieu of any other Annuity I may have
 granted to her” - - - - - 900

“ To Catherine Gilley Sister of the before
 named I bequeath three hundred pounds pro-

vided she do make a good assignment of her share of the Barrow" - - - -	300	1827. HEMING v. GLUTTERBUCK
" To my dear wife two hundred pounds for the same purpose" - - - -	200	
" To my dear wife Ann Heming I leave my Estate of Meadow Land at Edgeware in Middlesex for her sole use & benefit But do not recommend her to build at or reside there; if she finds that my nephew Richard Heming is deserving then she may leave it to him if she approves But if I should leave Issue then after my Wife's decease I will & devise this Estate to the said Issue for ever" - - - -	1500	
" To my dear Wife Ann Heming I leave my House in Tottenham Court Road" - -	850	
" I leave to my dear Wife to be paid her within one Month from my decease two hundred pounds and desire that all the bequests that relate to her may be settled as soon as possible after my decease in order that she may be in the receipt of her income" - -	200	
" To Felix Vaughan my Nephew to be placed in Trust till of Age" - - - -	500	
" To Richard Heming my Nephew in the same manner" - - - -	500	
" To Thomas Laver Son of Benjamin Laver as a Token of my esteem In trust till he is of Age" - - - -	500	
" To my respected Friend Alexander Baxter Esq ^r a piece of plate if he is alive value ———One hundred Guineas" - - - -	105	
" To Beatrix Peirce & Mary Mapletoft for their sole use One hundred Guineas to each" - - - -	210	

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" Geo : Heming"

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The testator died in April, 1801, without leaving any children. His father, Thomas Heming, had died in his life-time.

Thomas Ludbey and James Gurry, in February 1809, with the privity of the Appellant, out of the personal estate and effects of the testator, purchased and caused to be transferred into their names and the name of Ann Heming, the testator's widow, in the books of the Governor and Company of the Bank of England, one sum of five hundred pounds per annum, long annuities, in satisfaction of the bequest contained in the testamentary papers, constituting the will of the testator.

Ann Heming died in June, 1818, and the Appellant then set up a claim to have a second sum of five hundred pounds per annum, long annuities, purchased for his benefit; and Thomas Ludbey and James Gurry declining to purchase the same, the Appellant filed his bill in the High Court of Chancery against James Gurry (Thomas Ludbey having died in the mean time) and against Thomas Clutterbuck and Edward Evans, the executors of Ann Heming, which suit upon the death of James Gurry was revived against Thomas Clutterbuck, his executor. Amongst other things, the bill, stating the facts, prayed a declaration, that the Appellant was entitled to two legacies of five hundred pounds per annum long annuities under the testamentary papers, and that the Defendants might be decreed, out of the proceeds of the testator's personal estate and effects, to purchase for the benefit of the Appellant the sum of five hundred pounds per annum, long annuities, in addition to that sum of like annuities, already purchased and invested.

The cause was heard before the Vice Chancellor,

on the 5th of May 1825, who dismissed so much of the Appellant's bill as sought that the Appellant might be declared entitled to two legacies of five hundred pounds per annum, long annuities.*

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Against this part of the decree the appeal was presented.

For the Appellants, *Mr. Hart* and *Mr. Perkins*.

This is a question whether one or two legacies are given by the testamentary instruments, which must depend upon the construction of the instrument. The doctrine and rule is taken from the civil law, but it has been qualified and distinguished by circumstances shewing intention, &c., and otherwise, until the rule itself is nearly extinguished. The intention is to be looked at through the medium of former decisions on the subject. The doctrine applicable to the question was settled by the case of *Hooley v. Hatton*,† in which a rule is laid down to be applied to future cases. The judgment below was founded on the supposition that this was not an additional annuity, but a substitution. This was said to appear from the similarity of the two gifts.

3d April.

If it be a substitution, then nothing could in any event be taken under the former gift. If the testator had a child, the legatee could take nothing under the second instrument, and the second being supposed to be a substitution for the first, he could take nothing in that event under either of the instruments. From the general repetition of the bequests in the second instrument, it was inferred by the Vice Chancellor that all the legacies were intended to be repeated. But the legacies to Jane and Benetta Gilley are in the second instrument given expressly in lieu of other annuities. This caution being omitted

* See the report in the Court below, 2 Sim. & Stu. 310.

† 1 B. C. C. 390, (n.)

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as to other legacies, affords an inference that they were intended to be double. There are also other alterations: the legacies in the second instrument are offered, not as pure bounties, but on terms of purchase, indicating a great alteration of intention. Some are augmented, some diminished. It appears from the differences in the bequests, that his intention was fluctuating. In the second instrument there is no residuary bequest.

The Lord Chancellor.—And no executors.

Mr. Hart.—It was probably from these differences that Sir William Wynne thought the two instruments must stand together as one testamentary document. His opinion was—that the first document being a will was not revoked by a paper not naming executors nor bequeathing the residue: that paper he treats as a codicil. Where the same sum is given twice in the same instrument, the proof lies on the legatee to shew the intention to give a double legacy; where similar legacies are given by different instruments, it lies on those who claim against the legatee to prove the want of intention on the part of the testator. So the rule is stated by Swinburne from the civil law. In the case of the *Duke of St. Albans v. Beauclerk*,* the reporter has misconceived the intention of Lord Hardwicke, as to the doctrine which is to govern future Judges. The error has been set right in *Hooley v. Hatton*. In all the former cases it was admitted as the general rule, that where the same or different legacies were given in different instruments, they were held to be cumulative. In that case it might have been argued that the legacy of 1,000*l.* comprehended the two former legacies.

The supposed *dictum* of Lord Hardwicke, that one only shall be taken, is contradicted by the authorities

* 2 Atk. 636.

cited by himself. The rule is, that where less is given by the second than by the first instrument, the legatee shall take both. That rule applies to this case; because the legacy in the second instrument, being qualified and subject to contingency, is less beneficial than the first. The case of *Hooley v. Hatton*, was relied on by Lord Kenyon, in *Foy v. Foy*.* In *Ridges v. Morrison*,† the judgment of Lord Kenyon is cited. In *Hedges v. Peacock*,‡ Lord Alvanley decided that a legacy was double, because the first was more beneficial, and argued that the testator ought to have explained that he intended to take it away, as he did in the case of another bequest. So it is here: the first legacy is more beneficial, and he does not declare the second to be a substitution, as he does with respect to other legacies. Lord Alvanley lays down the rule, that a contingent legacy by a second instrument cannot be held a substitution for an absolute legacy by a former instrument, unless it is so declared. The judgment, as it stands, must proceed on contingencies: if there should be a child, the first instrument must prevail. If no child, the second. Another principle applied in the judgment is, that from the identity of the other bequests it is to be inferred, that the same rule is intended to be applied to the legacies in question. But Sir W. Grant, M. R., was of opinion, that each legacy must be judged by itself. *Benyon v. Benyon*.§ In *Ridges v. Morrison, &c.*, Lord Thurlow departs from the principle of *Hooley v. Hatton*, which he professes to adopt. All the cases but one adopt the rule, that where legacies are different in amount, or given by different instruments, they are

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* 1 Cox 164, 302. † In the notes, 1 B. C. C. 390. ‡ 3 Ves. 375.

§ 17 Ves. 41.

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cumulative. Inferences drawn from one class of legacies, are not to be applied to another class.

For the Respondents, *Mr. Heald* and *Mr. Boteler*.—They relied chiefly on the argument drawn from internal evidence, appearing by the similarity of the great majority of the bequests in the two instruments. The authorities cited were, *Coote v. Boyd*,* and the *Duke of St. Albans v. Beauclerk*.†

The Lord Chancellor.—Before this case is disposed of, it will be necessary to look into the authorities which have been referred to. The question whether it be one of difficulty or otherwise, comes before the House—without the assistance of full discussion upon argument in the Court below. The first duty of a Court of Justice, is to satisfy all parties that their case has been most fully heard, and the example of that practice should be set by this, the highest Court of Judicature in the Kingdom. This precept I have received from two of my predecessors; and by one of them, I was informed that he frequently derived the greatest benefit from the argument of the Counsel, who supported that view of the case, which upon the first impression he had himself taken, because he sometimes found that less was to be said on that side of the question than he supposed, and in consequence of the argument changed his opinion. The House has now been occupied six hours in hearing a case, which was dispatched in one hour in the Court below. That will always be the case where the question is not fully argued in the court of original jurisdiction.

We are bound to consider the two instruments as the will of the testator. I do not think the first impression upon the mind of any man, upon looking

* 2 B. C. C. 521.

† 2 Atk. 636.

at these two papers, would be that they make one will. A question of law is not, however, to be decided by the impression upon the mind of any individual, but by the rules of law; and Sir W. Wynne has decided by his judgment,* that these two papers are not to be considered as two wills, but as one will. The difficulty remains upon the construction of the contents of those instruments. I must look at the cases cited, and some which have not been mentioned, and which it is necessary to consider before judgment is given.

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The Earl of Eldon.—The question in this cause was—whether a party, Ann Heming, was entitled to two legacies of 500*l.* long annuities, or only to one. This question arose on two testamentary papers, or rather I should say, on what was proved as the will of the testator in the Ecclesiastical Court: it consisted of two instruments, which we must consider as constituting together the will, although it is very

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* *Extract from the Judgment of Sir W. Wynne.*

“Now there is nothing here to revoke paper F., which appoints executors and a residuary legatee. I take it to be quite clear that, supposing these two papers to be left in the same manner, this would not have been a revocation of the paper F. It is particularly laid down by Swinburne, in his seventh part, first section, page 527:—‘The former testament is not revoked, where in the latter will there be no executor named, for then the latter act is a codicil or addition to the former testament.’ Now in this case I think it would be so. It appears to have been a paper written probably in order to supply some defect in the former, for he was a person very much given to writing and copying papers. I think there is no reason to suppose that when he wrote paper G., he intended to revoke paper F., at least considering the way in which they are both left; and therefore I think these two papers, if they are of any validity, are to be taken together.”

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difficult, at least to my mind, to conceive how it should happen, that both those instruments should have been proved as part of the same will.

The first instrument professes, on the face of it, to be a very regularly formed will. The second instrument does not profess to be a codicil. It begins, "In the name of God Amen. I George Heming of Bond-street Goldsmith being of sound mind do make and ordain this to be my last Will and Testament." These two, however, each being in the form of a will, have been held in the Ecclesiastical Court to be one testament, and of course we are bound to consider them as such. The question in the cause is—whether a bequest of 500*l.* per annum for life, in the first instrument, and a bequest of as much as would purchase 500*l.* per annum in the long annuities, given by the second instrument, are both of them intended to apply to the same sum; in other words, whether these are cumulative, or whether the one is to be considered a substitute for the other.

The general principles upon which cases of this kind are to be decided, are so accurately laid down in the case of *Hooley v. Hatton*,* that it is unnecessary for me to trouble your Lordships further than by stating it. The rules of the Court of Chancery, and the rules of the civil law upon the subject, are there discussed by the late Mr. Justice Aston, and afterwards applied by the Lord Chancellor. There is this difference, however, that here the second instrument purports upon the face of it to be a will. There has been much reasoning upon the circumstance, that in that case the subsequent instrument appeared to be a codicil. On looking

* In a note to *Ridges v. Morrison*, 1 B. C. C. 390.

into all the cases, which I have done, I cannot agree with the learned Judge* who decided this case, that

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- * The Vice Chancellor; whose judgment on this point was delivered in the course of the argument at the bar. The report of the judgment on this point being very short in the reports of Messrs. Simon and Stuart, a full note of the judgment is here subjoined—from the Notes of the Short-hand writer.

The Vice Chancellor.—"This case does not in any manner turn upon the principles stated in the case of *Hurst and Beach*.* Those are principles which apply to a case in which the particular legacies are not in both instruments, and where there is no question whether the two instruments were intended either wholly or substantially as a substitution for each other. This case turns entirely upon the principle which has been referred to in the case of the *Duke of St. Albans* and *Beauchlerk*, and which was afterwards stated in a case which I have now before me, of the *Attorney General* and *Harvey*,† and which occurred again before me in the case of the will of General Rollo Gillespie. The question here is—whether the second instrument is not substantially a substitution for the first. Now substitution may be either total, or it may be partial. Total substitution is revocation,—partial substitution is to the extent of the exception, which is partially withdrawn from the operation of the second instrument; and in the case of General Gillespie's will, I considered it a partial substitution, as there the residuary estate was withdrawn from the operation of the second instrument, and confined to the first instrument. Now here it is quite plain that the second instrument is not a total substitution for the first. It is not a revocation, for there is no appointment of executors. The appointment of executors depends upon the first instrument, and probate has been also granted of that instrument. To what extent this may be a substitution, it is not necessary for me now to state. I am inclined to think that it might be contended, that this is a substitution in all respects, except as it regards the appointment of executors, and the gift of the residuary estate. I am not quite sure whether, when that came to be discussed, that would ultimately be the opinion of the Court, as the only question before me is—whether it is a substitution in respect to the annuity of 500*l*.

"It is not necessary for me to say more than that I am clearly of opinion that the instrument marked G., is a substitution for the

* 5 *Mad.* 350.† 4 *Mad.* 263.

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it was a very clear case,—on the contrary, it appears to me to be a very difficult one, though I concur in

instrument marked F. I believe it to be impossible that any body could read those instruments and come to a different conclusion. I believe it quite impossible that any rational mind that is applied to the subject, can by possibility come to a different conclusion. The original paper F. begins in this way:—‘In the name of God amen;’ and the second, paper G., precisely in the same way, ‘In the name of God amen.’ The original paper F. proceeds thus:—‘I George Heming of Bond Street in the City of Westminster Goldsmith of perfect mind and memory make this my last will and testament.’ The second, paper G., proceeds thus:—‘I George Heming of Bond Street Goldsmith being of sound mind and memory do make and ordain this to be my last will and testament.’ Then the first instrument proceeds thus:—‘Imprimis I bequeath to my dear and faithful wife Ann Heming 500*l.* sterling per annum for her life to be placed in and payable out of the long annuities.’ The second instrument proceeds thus:—‘Imprimis I give and bequeath to my dear wife Ann Heming formerly Ann Gilley so much money as will purchase 500*l.* sterling per annum in the long annuities.’ There is no difference whatever therefore thus far, and there is no variation whatever, except in the form of the expression, for there is none at all in substance. The second instrument proceeds thus:—‘and the income to be received by the said Ann Heming during her life for her own use and benefit and at her death to my child or children for their own use and benefit equally.’ Here he introduces what he does not introduce in the first instrument, namely, a gift of the 500*l.* to his child or children, if he should happen to have any children. He had no children either at the time of the making the first instrument, or at the time of making the second instrument. At the time when he made the first instrument, it appears he considered there was not the least probability he should have any children: throughout the whole of that instrument there is no provision for children: but on making the second instrument he does not seem to adhere to the same notion of probability, and he uses this exception, in order that if such an unexpected event should take place, there should be a provision for those children, and with that exception the gifts are precisely the same. He then proceeds in this way in the first will:—‘To Eleanor Gurry wife of the aforesaid James Gurry I bequeath 50*l.* sterling per annum for her life out of the long annuities and in the same trusts as

the judgment he has given. Those cases to which the general rule of law is made to apply, are those in which there is no internal evidence in the will itself what is the intent. In all those cases in which there is internal evidence, it has been admitted to be of great weight; and the question, then, is this—

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above, remainder of the term after her death to the children of Eleanor Gurry by James Gurry share and share alike upon their becoming of age each child to have their respective share transferred to them but the foregoing devise is not to take place except James and Eleanor Gurry do assign their share in an estate called Barrow to John Weaver and his wife as is after directed in the fullest manner in their power.' This, therefore, is the gift of an annuity of 50*l.* per annum to Eleanor Gurry, the wife of James Gurry, and after her death to the children of Eleanor Gurry by her husband James Gurry, provided she and her husband release such interest as they happen to have in a certain estate called the Barrow. Now in the second instrument we do not find that the order of the will is preserved: but there is in the second instrument a gift in the words I am now about to read:—'I bequeath to Eleanor Gurry wife of James Gurry 50*l.* per annum in the long annuities for her life and at her death equally to the issue she may have by James Gurry in default of such issue then at her disposal.' There is not annexed to that gift the condition before stated, that she and her husband should release their interest in the Barrow estate, but that gift of 50*l.* per annum is immediately preceded by a gift to Mr. and Mrs. Gurry, which are in these words:—'I bequeath to James and Eleanor Gurry in like manner 200*l.* for their share in the Barrow estate.' In the first instrument he gives them 50*l.* a-year provided they release their share in the Barrow estate; and in the second instrument he gives them 50*l.* a-year without such a condition, and 200*l.* for their share in the Barrow estate. Now, I need not follow this, as it goes through 14 or 15 bequests in a similar manner. I am of opinion that no one can look at this instrument, and say that, to the extent I have mentioned, this instrument is not to be considered a substitution for the first. Upon this point, therefore, you may give yourself no trouble Mr. Heald, and apply yourself merely to the question of the annuity of 180*l.* a-year."

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whether you can look merely at the different parts of both instruments which give the particular legacy, out of which the question arises, or whether you can look at that which in this case is, in my opinion, of great importance—whether you can look at the two instruments, with a view to the whole contents of each of them, in order to see whether the testator, in the case so put, did or did not mean to give not only to A, B, C, and D, and all the letters in the alphabet, but to be giving to them more than once. My opinion of the case is this, that taking the whole of those instruments together, although there is some difference between the nature of the trusts that are expressed relative to the 500*l.* long annuities, in the first will, and the 500*l.* long annuities in that which really I should have thought was a second will, if there had not been a decision of the Ecclesiastical Court, finding them to be one ;—that looking at the whole of what the testator has done with regard to every other legatee named in the first will, and in the second will, this is not a case in which you would be fairly justified in saying there is internal evidence which ought to satisfy you that the testator meant these to be cumulative. I conceive one legacy only was intended, and upon that ground, again professing this to be, in my judgment, a most doubtful and difficult case, I am of opinion that the Vice Chancellor's judgment is right, and that therefore your Lordships ought to affirm it: I would move that it be affirmed without costs.


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Judgment affirmed without costs.—18 June, 1827.

## ENGLAND.

(COURT OF CHANCERY.)

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 v.  
 ELWES  
 and others.

THOMAS DUFFIELD, Esquire, and }  
 EMILY FRANCES his Wife - - } *Appellants.*

AMELIA MARIA ELWES, Widow, }  
 and ABRAHAM HENRY CHAM- }  
 BERS, Esquire, WILLIAM HICKS, }  
 Clerk, and GEORGE THOMAS }  
 WARREN HASTINGS DUFFIELD, } *Respondents.*  
 CAROLINE DUFFIELD, MARIA }  
 DUFFIELD, ANNA DUFFIELD, and }  
 SUSAN ELIZA DUFFIELD, Infants, }  
 by Original and Amended Bill

And between the same Plaintiffs - *Appellants.*

ROBERT GREENHILL RUSSELL, }  
 Esquire, GEORGE SPENCER }  
 SMITH, the said WILLIAM HICKS, } *Respondents.*  
 Clerk, and AMELIA MARIA his }  
 Wife, late AMELIA MARIA }  
 ELWES, Widow - - - - - }

E. having by his will made a certain provision for his daughter,  
 an only child—with whom he had been offended on account of  
 a clandestine marriage—(but was reconciled to her and her  
 husband), declares to a common friend his purpose to make a  
 farther provision for his daughter. Being on his death bed,  
 and unable to write, he is urged by that friend to make a  
 gift to his daughter of certain monies secured by mortgage  
 and bond, and expressly assents to that proposal. In the  
 evening of the same day, being then unable to speak, he is  
 reminded by the same friend of the transaction of the morn-  
 ing, and the deeds of mortgage and bond securing the monies,  
 being produced, he is informed that it is necessary to con-  
 firm the gift by a delivery of the deeds; and the friend  
 proposed with the father's permission, to hand over the deeds

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to his daughter. Upon this proposal, the father made an inclination of his head, and the friend then handed the deeds across the bed where the father was lying, to the daughter on the opposite side; whereupon the father placed the hand of the daughter upon the deeds, and pressed it with his own hand for some minutes, and appeared satisfied with what he had done. The deeds in question consisted of, 1. A conveyance in fee of lands to secure 2,927*l.* with the usual covenant for payment of the money lent, and bond by way of collateral security. 2. An assignment of a mortgage debt of 30,000*l.*, and of a judgment for that sum recovered on a bond with a conveyance of the land, and the usual covenant for payment of the money.

Held that this was a valid *donatio mortis causa*; that the property in the deeds and the right to recover the money secured by them, passed by the delivery followed by the death of the donor, and that the real and personal representatives of the donor, were trustees for the donee, to make the gift effectual.

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THE original suit in this case was instituted in the Court of Chancery, by the Appellants Thomas Duffield, Esquire, and Emily Frances his wife, as Plaintiffs, with a view of obtaining the judgment of that Court upon several questions arising out of the various dispositions made by George Elwes, deceased, of different parts of his property, by way of settlement, gift and testamentary arrangement; and also for the purpose of placing the infant Defendants, the children of the Plaintiffs, under the protection of the Court.

The Appellant Emily Frances Duffield, was the only child and heir at law, and sole next of kin of George Elwes; she intermarried with the Appellant, Thomas Duffield, Esquire, in the year 1810. The children of that marriage were five; namely, the Respondent George Thomas Warren Hastings Duffield, the only son of the Appellants, an infant of the age of eleven years; and four daughters, the Respond-

ents Caroline Duffield, Maria Duffield, Anna Duffield, and Susan Eliza Duffield, all infants, younger than their brother. George Elwes died in 1821, leaving the Respondent Amelia Maria Hicks, his widow, who, after the decree pronounced in the original cause, married the Respondent the Reverend William Hicks. The Respondent Abraham Henry Chambers was the surviving devisee in trust and executor named in the will of George Elwes; the other trustee named in the will having died in the testator's life. The Respondent William Hicks was named an executor by George Elwes in a codicil. The Respondents Robert Greenhill Russell, and George Spencer Smith were the trustees of the settlement made on the marriage of the Respondent William Hicks, and Amelia Maria his wife.

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In the month of February, 1810, the Appellant Emily Frances Duffield, being then about the age of 18 years, intermarried with the Appellant Thomas Duffield, at Gretna in Scotland, without the knowledge of her father, and on the 11th day of March, 1810, the Appellants were re-married in England. Shortly after this re-marriage, George Elwes and the Respondent Amelia Maria, then his wife, received the Appellants into their house, to reside with them as part of their family. George Elwes, at the time of making his will, and until his death, was seised in fee simple of divers freehold and copyhold estates, and was also possessed of a very considerable personal estate. By his will, dated the 1st March 1811, and duly executed and attested to pass freehold estates, after directing that all his debts and funeral expenses, and the expenses of proving his will, should be paid, as thereafter mentioned, and confirming a jointure of 100*l.* per annum, and an annuity of 400*l.* to his wife, the Re-

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spondent Amelia Maria Hicks, he gave and bequeathed unto his dear daughter Amelia Maria Frances Duffield (meaning thereby his daughter the Appellant Emily Frances Duffield), the wife of Thomas Duffield, and her assigns, for her life, all that his leasehold messuage or dwelling-house, with the appurtenances, situate in High-street, Mary-le-bone, and he declared that the same should from and after her decease fall into the residue of his personal estate thereafter devised: And he gave and bequeathed unto his said daughter all his carriages, horses, household furniture and goods, plate, linen, china, stock of wines and other liquors, which should be in and about the said messuage or dwelling-house, or in or about any other house or houses in which he might dwell, or which he might inhabit at the time of his decease: And he gave and bequeathed unto his brother John Elwes, since deceased, and to the Respondent Abraham Henry Chambers, and their heirs, his freehold and copyhold farm and estate, in Suffolk, and also his freehold farm and estate in Essex, upon certain trusts therein expressed, for the benefit of the second or only son of the Appellants, or their daughters in failure of such son, with devises over: And the testator, after giving some legacies of stock and small annuities, and pecuniary legacies, devised and bequeathed the residue of his real and personal estates to the same trustees, upon trust to sell and convert into money all his real estates, mortgages, securities, &c., to hold the monies so produced in trust, among other things, to purchase so much 3 per cent. stock, as would yield 1,000*l.* per annum, and to pay the dividends to the Appellant his daughter, during her life, for her separate use; the principal at her death to fall into his personal

estate. The residue of the trust fund he disposed of, by special limitations, to the children of his daughter, and their children (if any); remainder to John Elwes.

By a codicil dated the 3d March, 1821, he declared the intent of a cancellation which he had made in that part of his will relating to the sale of his freehold, copyhold and leasehold estates: He devised his real estates to that son of his daughter, who should first attain 21; and appointed the Respondent, William Hicks, a trustee in the place of his brother deceased.

The testator, George Elwes, was entitled to the principal sum of 2,927*l.* and interest thereon due to him from Sir Edwin Bayntun Sandys, Baronet, secured by the bond of Sir Edwin Bayntun Sandys, executed by him to the testator, bearing date the 12th day of July, 1820, and further secured by indentures of lease and release and mortgage, bearing date respectively the 11th and 12th of July, 1820, whereby Sir Edwin Bayntun Sandys released and conveyed to the testator in fee simple, by way of mortgage, certain freehold estates. The deed also contained the usual covenant for repayment of the money lent. The testator, George Elwes, was also entitled to the principal sum of 30,000*l.* and interest thereon due to him from Sir Edwin Bayntun Sandys, and secured by certain indentures of lease and release, and assignment of mortgage, bearing date respectively the 2d and 3d of November, 1820. The release recited a loan of 30,000*l.* made by trustees under a marriage settlement to Sir Edwin Bayntun Sandys, a conveyance of lands therein described to secure the repayment, a bond executed for the same purpose, and a judgment recovered upon that bond. It

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further recited that the mortgagee having called in the money due on the mortgage, George Elwes had advanced to the mortgagee 30,000*l.*, in consideration of which the mortgagee, &c., by direction of Sir Edwin Bayntun Sandys, assigned to George Elwes the 30,000*l.* due on the mortgage and also the judgment, and conveyed the lands, &c. This deed also contained the usual covenant for payment of the money lent, on a day specified, with a power to sell the lands mortgaged on failure of payment.

George Elwes, shortly before his death, in conversations held with the Respondent William Hicks, frequently declared his purpose to make a further provision for his daughter. He was seized with the illness which ended in his death, on the 1st of September, 1821 : on the morning of that day the Respondent, William Hicks, proposed to George Elwes to make a gift, *mortis causâ*, to his daughter, of the monies secured by the two mortgages before mentioned, to which proposal, the nature of the gift having been explained to him by Hicks, George Elwes expressly assented. Of this proposal and assent a formal note was drawn up, and signed by Hicks and two other witnesses. In the evening of the same day, Mr. Hicks, having been informed that an actual delivery of the thing proposed to be given was necessary to the completion of the gift, caused the deeds of mortgage and the bond to be brought from the office of Mr. Law, the Solicitor of Mr. Elwes. These deeds were then, in the presence of the same witnesses, produced before the testator, and shewn to him, and he was informed by Hicks, that the same were the mortgage deeds and bond to secure the principal sums of 2,927*l.* and 30,000*l.* and interest due to him from

Sir Edwin Bayntun Sandys, and he was reminded by Hicks of what had passed in the morning, and informed that the gift would be unavailing, unless he confirmed it by passing the deeds: and Hicks then proposed, with his permission, to hand over the deeds to his daughter, whereupon he signified his assent by an inclination of his head. The mortgage deeds and bond were then, in the presence and under the eye and observation of George Elwes, handed by Hicks across the bed in which the testator then lay, to the Appellant Emily Frances Duffield, and were received by the Appellant Emily Frances Duffield, in her hands; and as soon as she had received the mortgage deeds and bond in her hands, George Elwes immediately took hold of her hands, which then contained the deeds and bond, and with both his hands pressed together the hands so holding the deeds and bond, and shewed evident marks of satisfaction. During the whole of this transaction, George Elwes, according to the depositions in the cause and the judgment of the witnesses, although he was unable to write or speak, was in a state of mind competent to dispose of his property, and was aware of what he was doing, and that he was thereby making a gift to the Appellant Emily Frances Duffield, of the benefit of the bond and mortgages.

On the 2d of September, 1821, George Elwes died, leaving the Respondent Amelia Maria Hicks, then Amelia Maria Elwes, his widow, and the Appellant Emily Frances Duffield, his daughter and only child and heir-at-law, and heir according to the custom of the manors whereof his copyhold estates were holden, and also his sole next of kin.

The Appellants had, at the death of George Elwes,

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five children, namely, the Respondent George Thomas Warren Hastings Duffield, their only son, an infant, and four daughters, infants; namely, the Respondents, Caroline Duffield, Maria Duffield, Anna Duffield, and Susan Eliza Duffield.

After the death of George Elwes, the Respondent, Abraham Henry Chambers, one of the executors named in his will, and the Respondent William Hicks, appointed executor by the codicil, proved his will and codicil in the Prerogative Court of the Archbishop of Canterbury.

On the 1st of October, 1821, the Appellants exhibited their original bill of complaint in the Court of Chancery, (which was afterwards amended,) against the Respondent Amelia Maria Hicks, by her then name and description of Amelia Maria Elwes, widow, the Respondents Abraham Henry Chambers, William Hicks, George Thomas Warren Hastings Duffield, Caroline Duffield, Maria Duffield, Anna Duffield and Susan Eliza Duffield, and others, as Defendants, which, among other things, stated the substance of the facts before mentioned, and prayed (among other things) that the *donatio mortis causá* to the Appellant Emily Frances Duffield, of the bond and mortgage securities might be established, and that the Appellant Emily Frances Duffield, or the Appellants in her right, might be declared entitled to the bond and mortgage deeds and to the monies secured thereby, and to all benefit thereof, and that the Respondents Abraham Henry Chambers and William Hicks, as executors and trustees of the testator, might be decreed to execute proper instruments to enable the Appellant Emily Frances Duffield, or the Appellants in her right, to receive the monies due and to become

due on the bond and mortgages respectively, and to obtain the full benefit of the securities; and that the Appellants, in her right, might be at liberty to sue in the name of the last named Respondents in any action or suit to be brought against the obligor in the bond, and the mortgagor in the mortgages, the Appellants thereby offering to indemnify the Respondents against all the costs of such action or suit; and that the will and codicil of George Elwes might be established, and the trusts thereof executed, &c.

The adult Defendants to the original and amended bill appeared, and put in their answers supporting the claims of the Plaintiffs as to the *donatio mortis causâ*. The infant Defendants submitted their rights to the care of the Court.

Witnesses were examined in support of the allegations of the bill, and the cause, being at issue, was heard before the Vice Chancellor on the 17th of April, 1823, when a decree was made, by which (among other things) it was declared, that the Court being of opinion that a mortgage security cannot by law be given by way of *donatio mortis causâ*, the Appellant Emily Frances Duffield was not entitled to the mortgage monies secured by the indentures (of mortgage) and the bond.

In 1824, the widow of George Elwes married the Respondent William Hicks, in consequence of which marriage there was a supplemental suit, and a decree in August, 1824, to carry on the proceedings.

The declaration of the decree in the original suit, as to the *donatio mortis causâ*, was the subject of the present appeal.

For the Appellants.

*Mr. Sugden.*—The fact of the gifts was not

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much questioned in the Court below; the argument was upon the question of law, whether money secured upon a mortgage can be the subject of a *donatio mortis causâ*. That the delivery of a bond on death-bed operates as a gift of the money secured by the bond, has been decided in *Gardner v. Parker*,\* following *Snellgrove v. Bailey*,† where Lord Hardwicke puts the case of an equitable interest in a chattel in possession with a legal title outstanding in a trustee, and says that the gift of the chattel would be valid as a *donatio mortis causâ*. At law a bond cannot be assigned. In the hands of a third party, it can only be made effectual by a power of attorney to sue in the name of the obligee. By the mere delivery of the bond nothing passes but the parchment. But it may operate as a gift of the money, and vest in the donee a right to use the name of the donor, or his representative, as if a power of attorney had been given to enforce the payment of the money. This is the principle of decision in *Gardner v. Parker*, and *Snellgrove v. Bailey*. If a sum of money is secured by bond and mortgage, the money secured is personal property. The real estate is simply a security for payment of the money. That the payment is secured by a mortgage as well as a bond, cannot alter the state of the question.

If there is a gift *inter vivos* of money secured by mortgage, the giver (mortgagee) becomes a trustee of the bond by which the debt is secured for the benefit of the donee. If the gift is by will, the heir of the testator becomes a trustee. The statute of frauds is out of the question; for it is a gift of the money secured, and not of the land by which it

\* 3 Mad. 184.

† 3 Atk. 214.

is secured. The debt is the principal subject, and the real estate being a mere security for the debt, passes as an adjunct to the principal.

The question was agitated in *Hassel v. Tynte*,\* but not decided. Lord Hardwicke thought the money was the principal, but that there was an interest in land. In the *Duchess of Buccleugh v. Hoare*,† it was held upon a gift of heritable bonds, that the heir was a trustee of the land for the legatee, and that the money secured passed as part of the personal estate.

The case of *Hurst v. Beach*,‡ is not in principle distinguishable from the present case. A gift by the mortgagee to the mortgagor of the money secured was there held good, although secured by real estate, which could not pass without a reconveyance.

The case as to the mortgage for 2,927*l.*, is more clear, the money being secured by bond as well as mortgage. Suppose the bond alone had been delivered: the money would have passed by the delivery, and the heir of the donor would have been a trustee of the land in mortgage for the donee. The deeds of an estate are a subject of property. The estate will not pass by the mere delivery of the deeds: but having been given, they cannot be recovered. In *Snelgrove v. Bailey*, Lord Hardwicke considered that the money secured passed by the delivery. There was no bond for the 30,000*l.*, but the money was secured by an assignment of the debt, by a conveyance of the land, and by a covenant to pay the money. The assignment of the debt existing, and the delivery of the deed of assignment, operates as a gift of the money assigned. In the case of a bond

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\* Ambl. 318.

† 4 Mad. 467.

‡ 5 Mad. 351.

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assigned, the assignee may pass the money by delivery of the assignment.

The effect of these nice distinctions is to increase litigation, because no advice can be given in such a state of the law. There is no solid distinction in this respect between a bond and a covenant. The money passes by the delivery in both cases, because they are securities for money, and capable of assignment. The remedy is the same, and the circumstance that there is an additional security by a mortgage of real estate cannot alter the nature of the gift or the remedy: money secured by mortgage, may be given by a will without witness; so when there is an existing agreement, the mere delivery of deeds operates as a mortgage. These cases must be considered as excepted out of the statute of frauds; otherwise courts of equity have assumed a power of legislation. Where this depends on contract, the relief goes to the extremity of the jurisdiction. The decisions rest not merely on the ground of contract, but because the act of gift is plain and unequivocal. In this case, how in principle can it affect the right under the inferior securities, that there is also a security of a higher nature.

*Mr. Longley.*—A mortgage, though in fee and forfeited, still continues, in equity, a mere security for money, and belongs to the personal estate of the mortgagee; while the estate in the land remains in equity, and to many purposes at law, in the mortgagor. *Pawlett v. Attorney General*;\* *Thornborough v. Baker*;† *Noy v. Ellis*;‡ *Ellis v. Gravas*;§ *Cope v. Cope*;|| *Howell v. Price*.¶

\* Hardr. 460. † 1 Ch. Ca. 283, and from Lord Nottingham's notes in 3 Swanston 628. ‡ Ch. Ca. 220. § 2 Ch. Ca. 50.

|| 2 Salk. 440.

¶ 1 P. Wms. 294.

In *Chester v. Chester*,\* Lord Chancellor King observes, "An estate, though mortgaged, continues still to be the estate of the mortgagor; subject to the payment of the pledge which is upon it; and the mortgagee's right is only to the money due upon the land, not to the land itself."

*King v. King*;† *Galton v. Hancock*.‡

In *Martin v. Mowlin*,§ Lord Mansfield says, "A mortgage is a charge upon the lands, and whatever would give the money, will carry the estate in the land along with it to *every purpose*. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to executors; it will pass by a will not made and executed with the solemnities required by the statute of frauds. The assignment of the debt, or forgiving it, will draw the land after it as a consequence. Nay it would do it though the debt were forgiven only by parol; for the right to the land would follow, notwithstanding the statute of frauds." *Earl of Tankerville v. Fawcett*.||

In *Silberschildt v. Schiott*,¶ Sir William Grant, M.R., says, "If the testator's interest had been really a mortgage, there is no doubt a gift of the money would have carried his interest in the land upon which it was secured."

In *Lord Cholmondeley v. Lord Clinton*,\*\* Sir Thomas Plumer, M. R., says, "In the hands of the mortgagee, the mortgage is considered in equity, as a mere personal chattel which passes to the executor."

\* 3 P. Wms. 62. † *Ibid*, 361. ‡ 2 Atk. 424, 435.

§ 2 Burr. 969, 978. || 1 Cox's Rep. 237, 239.

¶ 3. Ves. & B. 49. \*\* 2 Jac. & W. 179.

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On the other hand, the equity of redemption constitutes the estate in the land. It is not merely a trust—it is a title in equity.\* It is of such consideration in the eye of the law, that the law takes notice of it and makes it assignable and devisable,† as Lord Hardwicke held in *Casburne v. Scarfe*.‡ An equity of redemption is so completely the estate in the land, or rather the land itself, as to be capable of such an adverse possession, as, by length of time, to confer on the adverse possessor an indefeasible title. The *Marquis of Cholmondeley v. Lord Clinton*.§

A debt is a *chose* in action; a right to a certain sum of money. This right may be secured in various ways, by record or specialty; or the debt may be allowed to remain due upon simple contract only.

Obligations by specialty comprehend both bonds and covenants for the payment of money. A single bond or bill to pay a sum of money at a day certain, is, in its nature and legal operation, precisely equivalent to a covenant to pay the same sum in the same manner. For, 1st, Each instrument creates a contract or obligation by specialty. It is laid down in Shepherd's Touchstone, chap. 21, "Of an Obligation," that, "any words in a writing, sealed and delivered, whereby a man doth prove and declare himself to have another man's money, or to be indebted to him, will be a good obligation." As, "Mem., that I, A, of B, do owe to C, of D, £20., to be paid at Easter next: or, mem., that I, A, of B,

\* Hardr. 467. † *Ibid*, 469. ‡ 2 Jac. & W. 194.

§ Dom. Proc. June, 1821. MSS.

*do promise to pay* C, of D, £20.: or, mem., that I, A, of B, *will pay* to C, of D, £20.: or, mem., that I, A, of B, have had £20. of the money of C, of D," with many other examples.

2d. Each instrument binds executors and heirs, if they are named in the instrument.

3d. A bond, though usually made in the first person, may be made in the third person.\* And a deed of covenant, though usually made in the third person, may be made in the first person.†

4th. Actions of debt or of covenant will lie interchangeably on the respective instruments.

"Debt" lies upon every express contract to pay a sum certain, as if a man *covenants* or grants to pay.‡ If covenant be to pay rent or other sum at such a day, he may have "debt" or covenant.¶ So conversely, *covenant* will lie on a bond, for it proves an agreement. Per. Lord Nottingham in *Hill v. Caw*.§ Both bond and covenant to pay a sum of money, constitute an obligation by specialty to do a personal thing.

The money secured is a personal chattel, which came originally from the personal estate of the lender, and accrued to the personal estate of the borrower, and is to return from the personal estate of the debtor to that of the creditor; and the securities, whether of bond or covenant, are of a personal nature, being the foundation of personal actions. Since, therefore, the debt secured by mortgage is a personal chattel, though enjoying the benefit of a real security; it must follow that the addition of the

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\* Co. Litt. 230. a.

† Litt. Sect. 371, 372.

‡ Com. Dig. Dett. [A. 8] 1 Leo. 208., 2 Leo. 119.

¶ Com. Dig. Action M. 4 Cro. Eliz. 797. § Ch. Ca. 294.

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personal securities of a bond or covenant to the mortgage debt, cannot possibly diminish or alter the personal nature of the debt.

The money secured by mortgage, bond, and covenant, or by mortgage and bond, or by mortgage and covenant, still remains a personal chattel, and the debt, or the right to the money, remains a personal *chose* in action.

A creditor, having both bond and mortgage, may put in force which of the securities he will: he may put by the mortgage and sue only on the bond. *Clarke v. Lord Abingdon*.\*

In many instances it may be most eligible for the holder of both securities to put in force the personal obligation.

Suppose a mortgage and bond given by way of *donatio mortis causa*, and the mortgage be a second mortgage in fee, and the real estate an insufficient security, and swallowed up by the first mortgage, it might be best to sue on the bond. The bond would, in that case, be the only valuable part of the gift.

Or, supposing the debt to be secured by a first mortgage in fee, with a covenant for payment of the money, and the mortgaged premises were destroyed by the accident of fire or flood, then the only security available to the creditor, would be the specialty obligation contained in the covenant.

If there be a debt secured by mortgage and bond, or by mortgage and covenant, the assignment of the debt will carry the trust in the mortgaged estate to the assignee. In *Bosville v. Brander*,† the question arose, whether the benefit of the

\* 17 Ves. 106.

† 1 P. Wms. 458. 460.

wife's mortgage in fee passed by the assignment of the Commissioners under the husband's bankruptcy to the assignees; and Sir J. Jekyll, in delivering his judgment, observes, "There being in the mortgage deed a covenant to pay the mortgage money to the wife, this debt or *chose in action*, was well assigned by the Commissioners to the assignees, and vested in them, like the case of *Miles v. Williams*,\* where a bond made to a wife, *dum sola*, was adjudged to be liable to the husband's bankruptcy, and assignable by the Commissioners."

"Wherefore, if the right to the debt was vested in the assignees, (as plainly it was,) though the legal estate of the inheritance of the lands in mortgage continued in the wife, yet this was not material; it being no more than a trust for the assignees; like the common case, where there is a mortgage in fee, and the mortgagee dies, here the mortgage money belonging to the executors, though the heir takes the legal estate by descent, yet he is but a trustee for the executor; for the trust of the mortgage must follow the property of the debt."

In *Bates v. Dandy*,† Lord Hardwicke held that a husband may dispose of the beneficial interest of his wife's mortgage in fee, as well as of her mortgage for a term.

The definition of a *donatio mortis causa*, is given in the Institutions,‡ in these words:—"Mortis causa donatio est, quæ propter mortis fit suspicionem: cum quis ita donat, ut si quid humanitus ei contigisset, haberet is qui accepit; sin autem supervivisset, is qui donavit, reciperet: vel si eum donationis pœnituisset; aut prior decesserit cui donatum sit." The Emperor then

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\* 1 P. W. 249.  
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† 2. Atk. 207.  
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‡ Lib. 2. tit. 7. s. 2.

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proceeds to observe, that, “ *Hæ mortis causâ donationes ad exemplum legatorum redactæ sunt per omnia: nam cum prudentibus ambiguum fuerat utrum donationis an legati instar eam obtinere oporteret, et utriusque causæ quædam habebat insignia, et alii ad aliud genus eam retrahebant: a nobis constitutum est ut per omnia fere legatis connumeretur, et sic procedat, quemadmodum nostra constitutio eam formavit.*”

A *donatio mortis causâ* has the character of a legacy, by way of contradistinction to a gift *inter vivos*.\*

Every thing, which, by the Roman law, might be bequeathed as a legacy by will, might be the subject of a *donatio mortis causâ*. Thus a landed estate might be so given,† or a slave,‡ or a farm subject to a mortgage,§ or a simple contract debt,|| or a part of a debt,¶ or a chirograph or bond for money might be given to a donee *mortis causâ* as a trustee for the obligor, and the beneficial interest in the debt would pass.\*\*

The parity of a *donatio mortis causâ*, with a legacy, is summed up by Ulpian, in these words—“ *Illud generaliter meminisse oportebit donationes mortis causâ factas, legatis comparatas: quodcunque igitur in legatis juris est, id in mortis causâ donationibus erit accipiendum.*”†† And by Voet, in his commentary on the Pandects,‡‡ in the following words—“ *Sed et regulariter, quales res, et quibus, et per quos legari possunt etiam mortis causâ rectè donantur.*”

\* Cod. lib. 8. t. 57. s. 4.

|| *Ibid.* s. 18. par. 1.

† Dig. lib. 39. tit. 6. s. 14.

¶ *Ibid.* s. 31. par. 3.

‡ *Ibid.* 11. 37. 39:

\*\* *Ibid.* s. 18. par. 2.

§ *Ibid.* s. 18. par. 3:

†† Dig. lib. 39. tit. 6. s. 7:

‡‡ Lib. 39. tit. 6. s. 4:

In *Hedges v. Hedges*,\* Lord Chanc. Cowper says “ a *donatio mortis causâ* is where a man lies in extremity, or being surprised with sickness, and not having an opportunity of making his will ; but lest he should die before he could make it, he gives with his own hands his goods to his friends about him ; this, if he dies, shall operate as a legacy ; but if he recovers, then does the property thereof revert to him.”

In *Ashton v. Dawson and Vincent*† the Lords Commissioners, in their judgment, speaking of a *don. m. c.* say—“ It is not a legacy, nor is there any occasion for the executor’s assent to it : it is *not a gift at common law*, but in *view of death* ; here are express words, but *if he had used no words*, and had been near death, it had been looked upon as a *donatio mortis causâ* ; it is a testamentary legacy, of which the common law takes notice, but not proveable in the Ecclesiastical Court ; it is only questionable here ; and the executor’s assent is not necessary, because he might die intestate.”

There must be a delivery to perfect a *don. m. c.* according to the law of England. *Ward v. Turner* :‡ but then the delivery is according to the nature of the subject ; if it be a small chattel in possession, the chattel itself must be delivered, or at least the key of the trunk or receptacle containing it. *Jones v. Selby*,§ *Bunn v. Markham* :|| if the gift be of bulky goods the delivery of the key of the warehouse or room containing them is sufficient. *Smith v. Smith* :¶ if it be a *chose in action*, a specialty debt, the instrument creating or securing the debt must be delivered. Thus a bond debt, *i. e.* the equitable interest in the

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\* Prec. Cha. 269.

§ Prec. Cha. 300.

† Sel. Cha. Ca. 14.

|| 7 Taun. 224.

‡ 2 Ves. sen. 441.

¶ 2 Stra. 955. 1734.

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debt, may pass by way of *donatio mortis causâ*, by delivery of the bond. *Snellgrove v. Bailey*,\* *Gardner v. Parker*,† *Blount v. Burrow*,‡ the benefit of lottery tickets by delivery of the tickets; *Gold v. Rutland*,§ a specie bill by delivery of the bill; *Drury v. Smith*,|| an Exchequer Tally by delivery, or, what is tantamount to delivery of the Tally; *Jones v. Selby*,¶ and, as we contend a mortgage debt by delivery of the mortgage deed, and a specialty debt secured by covenant by delivery of the deed containing the covenant to pay; there being in each of these cases presupposed an intention to give the debt or *chose in action*.

In *Snellgrove v. Bailey*,\*\* Lord Hardwicke considers the question to be, *not* whether a bond can generally be given by way of *donatio inter vivos*, but whether the equitable interest in the bond can properly be made the subject of such a gift as he is treating of, namely, a *donatio mortis causâ*. And he decided in the affirmative.

The question now in litigation, is not whether the legal estate in the land may pass by a *donatio inter vivos of the deeds*, as the Vice Chancellor seems to have considered it to be; but whether the equitable interest in the debt secured by these deeds can pass by a *donatio mortis causâ* of the deeds made with the intention of giving the debt by this legatory disposition.

From Lord Hardwicke's doctrine as to the nature of mortgages, and the mode of assigning a mortgage debt laid down in *Richards v. Symes*,†† and from

\* 3 Atk. 214.

|| 1 P. Wms. 404.

† 3 Mad. 184.

¶ Prec. Ch. *suprà*.

‡ 4 Bro. C. C. 72. 1 Ves.

\*\* 3 Atk. 214.

jun. 546.

†† Barnard. Ch. R., 90

§ 1 Eq. Ca. Abr. 346.

the case of a *donatio mortis causa* of a mortgage which he puts hypothetically, in *Ward v. Turner*,\* we may infer that that learned Judge thought favorably of such a donation, although in *Hassel v. Tynte*† he avoided deciding the point.


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The benefit of a mortgage security belongs to the personalty of the mortgagee; the mortgage debt is a *chose in action* due from the personal estate of the mortgagor, and any act of assignment or charge of the debt by any person having authority to assign or charge it, will operate as an assignment or charge, *pro tanto*, of the trust of the mortgaged land. *Donationes mortis causa* have been admitted of money bonds of private persons; of bonds of the East India Company; of Exchequer Tallies; of specie bills; of lottery tickets.—To ask, therefore, of a Court of Equity to establish a *donatio mortis causa* made of a mortgage deed, with the intention of giving the debt, is only requiring the Court to pursue its own principles, and to acknowledge and allow this necessary corollary from its doctrines and former decisions.

The *factum* of the gift is proved by three unexceptionable witnesses to the donor's declaration of giving his property in the mortgages to his daughter, Mrs. Duffield; and three, equally unexceptionable, to the fact of the delivery over of the deeds to the donee, in the donor's presence and by his desire. The gift was of several securities, and where there are several securities for the same debt, an assignment or gift by the creditor of one security is an assignment or gift of the debt, and neither the creditor nor his representatives can be permitted to set up the other security for the purpose of defeating that assignment or gift; but those who hold the legal estate in the

\* 2 Ves. sen. 443.

† Ambl. 318.

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collateral securities become trustees for the assignee or donee of the debt. *Duchess of Buccleugh v. Hoare*.\*

The donee is entitled to the bond of 12th July, 1820, and to the benefit of the mortgage and covenant for securing the same debt. The decree, however, has not only denied to Mrs. Duffield the benefit of the deed of covenant and mortgage, but has stripped her of her property in the bond, and is therefore erroneous.

As to the objection founded on the statute of frauds, on which of the sections does it rest? Is it the *third* section, which prohibits an assignment of an interest in land except in writing? That is answered by the consideration that the debt is the principal thing conveyed, and the gift by way of *donatio mortis causá* of the debt draws after it consequentially the trust of the land, in the same manner as when an assignment for valuable consideration is made by parol, the equitable assignment of the debt draws after it consequentially the trust in the land.

Is it the 5th section which prohibits devises of freehold estate, except by will attested by three witnesses? Our answer is, that a mortgage security is mere personal property in equity: that a bequest of the mortgage money by an unattested will, will pass the mortgage money, and draw after it consequentially the trust of the land pledged for its security.

Is it the 6th section against revocations of wills of land, except by writing attested? Or the 22d section which prohibits revocations of wills of personal estate by word of mouth only? The answer to that is that a will of personalty may unquestionably be revoked, *pro tanto*, by a *donatio mortis causá* made

\* 4 Mad. 476.

subsequent to the will of the property bequeathed by the will; and this, notwithstanding the section 22 of this statute, and a *donatio mortis causâ* of the mortgage, is a *donatio mortis causâ* of the equitable right to the money, and does not assume to revoke the devise of the legal estate in the land.

Can it be the 7th or 9th sections, which make void all declarations and assignments of trusts of land, unless made in writing? To these we reply, that the *donatio mortis causâ* of the deeds does not assume to convey any interest in the land whatever, by trust or otherwise; but the gift *mortis causâ* of the equitable interest of the debt, made by the delivery of the deeds, will draw after it consequentially the trust or benefit of the security of the landed pledge, as in cases of valid assignment of the debt merely, *inter vivos*.

Is it the 19th section which the Respondents rely on, which prescribes certain rules for the making of nuncupative wills? This difficulty is removed by observing, that the Appellants have never set up this gift as a nuncupative will; but they claim it as a *donatio mortis causâ*, a species of gift sanctioned by a series of authorities in our law, all of them posterior to this statute of frauds, which has been supposed to present such obstacles to this kind of legatory disposition.

The deeds themselves belong to Mrs. Duffield, by the gift of her father, and there exists no equity, to take them from her.

It is clear, from decided authorities, that a gift even *inter vivos* may be made of deeds. "A man may give or grant his deeds, *i. e.* the parchment, paper, and, wax, to another at his pleasure, and the grantee may keep or cancel them. And, therefore, if a man

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have an obligation, he may give or grant it away, and so sever the debt and it. So tenant in fee simple may give or grant away the deeds of his land, and the executor in the first instance and the heir in the last hath no remedy.”* *Kelsack v. Nicholson*.† Again, “A man may give or grant his deed to another, and such gift by parol is good; and if a man hath an obligation though he cannot grant the thing in action, yet he may grant the deed, viz., the parchment and wax, to another, who may cancel and use the same at his pleasure.”‡

An heir at law is always a favoured character both in courts of law and equity. An incumbent of a church purchases the inheritance of the advowson and dies, and the dispute being between the heir and the executor who should present to the church, it was adjudged in favour of the heir that all was but as one instant; and where these two titles concur in one instant, the heir should be preferred as claiming under the elder right. *Holt v. Bishop of Winchester*.§

Lord Chancellor Macclesfield says, in *Edwards v. Countess of Warwick*,|| “I take it to be clear, that if I voluntarily, and without any consideration, covenant to lay out money in a purchase of land, to be settled on me and my heirs, this Court will compel the execution of such contract, though merely voluntary; for, in all cases where it is a measuring cast between an executor and an heir, the latter shall in equity have the preference.”

The want of surrender of a copyhold or a defective execution of a power will not be supplied for younger children against an eldest child being the heir unpro-

* Shepherd's Touch. Ch.
 12. p. 241.

† Cro. Eliz. 496.

‡ Co. Litt. 232, (b).

§ 3 Levinz. 47.

|| 2 P. Wms. 176.

vided for. *Cooper v. Cooper* ;* nor for grandchildren in any case. *Kettle v. Townsend*,† *Perry v. Whitehead*.‡ *A fortiori* there can be no equity in this present case ; for grandchildren, amply provided for by their grandfather's will, to diminish the comparatively small provision he has made for his only child and heir-at-law.

Provision for a child is always favored in equity : *Lord Grey v. Lady Grey*.§

For the Respondents, the children of Mr. and Mrs. Duffield—Mr. Heald and Mr. M. West.

Mr. Heald.—The evidence as to the delivery is peculiar.

The Lord Chancellor.—It does not appear that any thing was read, or any question raised as to the fact of donation. It appears by the report to have been decided purely on the question of law, and that without hearing the counsel for the Defendant.

Mr. Sugden.—The depositions as to the delivery were read. The case was argued on both sides, and the Vice Chancellor, expressing doubts on the question, recommended an appeal.

The Lord Chancellor.—This should have been noticed in the report.

Mr. Heald.—Mr. Hicks, in his deposition, used the word “propose ;” but it does not appear that Mr. Elwes was informed what was the amount of the property proposed to be given. This case will form a precedent ; and it is of great importance it should be ascertained whether he intended to give the 30,000*l.* or the 2,927*l.*, or both ; for it remains in uncertainty what he intended to give. The evidence is very loose, as purporting to shew a full and perfect delivery, with a knowledge of the exact subject-

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* 2 Vern. 265.

‡ 6 Ves. 544.

† 1 Salk. 187.

§ 1 Ch. Ca. 296. 2 Swan. 594.

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matter of the gift. In these cases the same evidence should be required, whether the gift is to a child or to a stranger. Would such evidence be held sufficient in the case of a stranger? It goes further than any case in the books. The proposal is made by a third person, and the evidence of assent is by nodding. In the morning Mr. Hicks pressed for an answer, and it was given. But in the evening when they had the deeds, no answer was required, and he was in fact unable to answer. The evidence of Mr. H. Elwes is not very consistent with the other evidence. Probably he has confounded the two meetings. In *Tate v. Hibbert** it was a *donatio inter vivos*.

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It can make no difference that a bond is given with the mortgage. The destruction of the deed does not destroy the estate of the mortgagee. To encourage these donations, renders property insecure. It is against the policy of the law.

The Lord Chancellor.—Suppose the bond alone is given without the mortgage,—is the mortgage not to pass, if the debt is given by the bond? The Vice Chancellor spoke to me about this case, and I then thought that there could not be a *donatio mortis causâ* of a mortgage. But now I confess I do not find it easy to maintain the opinion which I then held. Giving the bond must do something or nothing. If it does something, and gives the debt—will not the mortgage debt follow?

Mr. West.—The question is, whether there can be a *donatio mortis causâ* of the beneficial interest in a mortgage, by the delivery of mortgage deeds. It is said that the doctrines and principles relating to gifts of this nature are founded upon the civil law; but the Roman

* 2 Ves. jun. 111.

law is admitted in our own law, so far only as it has been received and allowed by our law; the civil law and our law differ in many respects. The civil law required many solemnities, having regard to fraud and influence—it required five witnesses: our's does not. By the civil law it partook more of the nature of a legacy than a gift; though by the early Roman law, delivery was necessary to perfect the gift; in the time of Justinian, delivery was not necessary. But our law requires delivery. *Irons v. Smallpiece*.* And it is a general rule that there can be no *donatio mortis causâ* of those things of which the delivery will not perfect the gift; and those cases which have been determined otherwise, are exceptions to the rule, and stand upon very different grounds from the present case.

The delivery of a note not payable to bearer, cannot be the subject of a *donatio mortis causâ*, because it is a mere *chose in action*, and must be sued for in the name of the executor. *Miller v. Miller*.† Nor can the delivery of receipts for South Sea annuities.‡

The exceptions to the rule are:—the case of *Lawson v. Lawson*,§ where the husband draws a bill upon his goldsmith, payable to his wife, with a direction indorsed upon it, that it should be applied for mourning. This was held to be a good *donatio mortis causâ*; but stress was laid upon its being for mourning, which might operate like a direction given by the testator touching his funeral, which need not be in the will. And on another ground it was held good, as an appointment of the money in the banker's hands; it might likewise have been proved

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* 2 B. & A. 553.

‡ 2 Ves. 432.

† 3 P. Wms. 358.

§ 1 P. Wms. 441.

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as a testamentary paper. And of this case Lord Thurlow said he did not see the *ratio decidendi*. See *Tate v. Hibbert*.*

Snellgrove v. Bailey,† is the case of a bond, but the reasons which Lord Hardwicke gives for that determination in *Ward v. Turner*,‡ are technical and unsatisfactory; and they don't apply to the case of a mortgage: first he says, that some property is conveyed by the delivery; for the person to whom this specialty is given, may cancel, burn, and destroy it; the consequence of which is, that it puts it in his power to destroy the obligee's power of bringing an action, because no one can bring an action on a bond, without a *profert in curia*; but this reason does not apply in respect of a mortgage debt; for an action may be maintained in respect of a mortgage debt, though the deeds are destroyed; and there is no necessity for a *profert in curia* of deeds which take effect under the statute of uses, because the deeds belong to the grantee to uses; see *Whitfield v. Faussett*.§ Another reason Lord Hardwicke gives, that the law allows it a locality; and therefore a bond is *bona notabilia*, so as to require prerogative administration, where a bond is in one diocese, and goods in another; this reason does not apply to the case of a mortgage debt; and Lord Hardwicke, probably upon consideration, thought he had gone too far: for he says in *Ward v. Turner*, "If I went too far in *Snellgrove v. Bailey*, it is not a reason I should go further, and I choose to stop there."

But there is a great difference between a bond and a mortgage debt. If a scrivener be entrusted with

* 2 Ves. jun. 120.

† 3 Atk. 213.

‡ 2 Ves. 442.

§ 1 Ves. 394.

the custody of a bond, and he receive the principal, and deliver up the bond, being entrusted with the security itself; it shall be presumed that he is entrusted with a power over it, and with a power to receive the principal and interest; and the rather, because the giving up of the bond upon the payment of the money, is a discharge thereof, otherwise if the obligee take away the bond, for then he had no authority to receive any money; but if the scrivener be entrusted with the *mortgage deed*, not the bond, he hath only authority to receive the interest but not the principal, because the giving up the deed is not sufficient to restore the estate; but there must be a re-conveyance to restore the estate, whereas the giving up a bond in law is an extinguishment of the debt, *Whitlock v. Walham*.*

But then it is said there is no difference between the delivery of mortgage deeds by a mortgagee to the mortgagor; and the delivery of mortgage deeds by the mortgagee to a third person. And it has been decided that by a delivery by a mortgagee to a mortgagor of mortgage deeds, there can be a *donatio mortis causâ* of the mortgage. *Richards v. Syms*.† *Hurst v. Beech*.‡ But there is a great difference where deeds are delivered to a person who has an interest, and a person who has no interest.—And this difference is established both in the civil law and our own law. By the civil law—*Si debitori meo reddiderim cautionem videtur inter nos convenisse non peterem*. So by our own law, delivery of a bond to a debtor is a discharge of the debt.§ But by the delivery of a bond to a third person, no presumption arises of a gift to that person, either by the civil law or our own law. A lessee of tithes cannot grant tithes without deed; yet a parson may grant tithes to

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* 1 Salk. 157.

† Barnard. 90.

‡ 5 Madd. 351.

§ 2 Roll. Abr. 56.

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him that is to pay them without deed.* So common of pasture cannot be granted without deed, but it may be without deed to a person who has land to which common is appurtenant, and in *Hassel v. Tynte*,† Lord Hardwicke recognizes the distinction, for he says, it was a very considerable question whether, by the delivery of mortgage deeds, there be a good *donatio* of the mortgage, and he there says *Richards v. Symes* was a slight precedent.

This case, therefore, is brought within none of the exceptions, and where such an immense mass of property is invested upon mortgage, it would be dangerous to make a precedent, by which large property might be disposed of upon the testimony of one witness; with none of the checks which the law imposes upon nuncupative wills. I admit that it has been decided both in *Cashburne v. Inglis*,‡ and in various other cases, that the person having the equity of redemption of the mortgage, is considered as owner of the land, and the mortgagee is only entitled to retain it as a security for his debt; and that a mortgage in a Court of Equity is only considered as personal assets; but still it is a debt, and only a *chose in action*; and being an incorporeal thing does not pass by the delivery; but then it is said by Mr. Sugden to be like the case of an equitable mortgage where a Court of Equity would compel an actual mortgage to be made, where deeds have been deposited to secure money lent; but of these cases Lord Eldon said in *ex parte Mountford*,§ that the first determination establishing a mortgage by a deposit of deeds, surprised the bar considerably. The present case, however, is different. Here the party comes as a volunteer; the case of an equit-

* Shep. Touch. 230.

‡ 2 Eq. Ab. 728, 1Atk. 603.

† Ambler, 318.

§ 14 Ves. 606.

able mortgage rests upon contract and a valuable consideration. There are two mortgages in this case; one is a mortgage alone; the other mortgage is secured by a bond; but if there can be no *donatio mortis causâ* of a mortgage, the fact of there having been a bond given can make no difference; the bond is only collateral to the mortgage, and the incident must follow the principal.*

Mr. Sugden in reply.—

The gift took place in the morning in the absence of the deeds. Gesture is sometimes stronger than words; which may be extorted. In *Gardner v. Parker*, the Vice Chancellor compelled the executor to lend his name to the donee for the purpose of suing upon the instrument. This was one step. *The Duchess of Buccleugh v. Hoare* provided another step, where the Vice Chancellor held that the heir was a trustee to make the heritable bonds effectual for the donee. The fallacy of the judgment is in supposing the claim to be against the donor, whereas it is against his representatives. In mortgages the estate in the land waits on the money. The debt is the principal thing. The land is the incident inseparable from it. When the debt is assigned, the security must follow.

The Earl of Eldon.—In the first of these causes there is an appeal from the Judgment† of the then Vice Chancellor, the present Master of the Rolls, in which he makes this declaration, and from that part of the judgment the present appeal is brought. “ This

* Mr. Pepys proposed to argue the case for Mr. Chambers; but the Lord Chancellor said, that unless he could shew that his client had a distinct interest from the other Respondents, he could not be heard.

† 1 Sim. & Stu. 244.

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Court doth declare, that this Court being of opinion that a mortgage security cannot by law be given by way of *donatio mortis causâ*, the Appellant, Emily Frances Duffield, was not entitled to the mortgage monies secured by the indentures of the 2d and 3d of November, 1820, and the bond of 12th July, 1820, and by the indentures of lease and release and mortgage, dated the 11th and 12th of July, 1820."

This judgment, therefore, proceeds upon the expression of an opinion, that a mortgage security cannot by law be given by way of *donatio mortis causâ*; and if it be true that a mortgage security cannot by law be given by way of *donatio mortis causâ*, it certainly then would be unnecessary to inquire whether the mortgage of November, 1820, and the bond of July, 1820, and the indentures of mortgage also of the 11th and 12th July, 1820, have been given by way of *donatio mortis causâ*; because if a mortgage cannot be so given, it is quite unnecessary to consider whether, under the circumstances of this case, it can be held that there was a *donatio mortis causâ*.

Before I proceed to state the opinion which I have formed upon this subject, it is my duty to the learned Judge, from whose judgment this is an appeal, to say, that probably he has been influenced in the opinion which he has expressed by something which had fallen from me in a conversation with him, in which I had certainly expressed very great doubt whether a mortgage could be made the subject of a *donatio mortis causâ*. I consider it just to state that this is so.

The judgment is commenced by the learned judge in the words I am now about to read. "The case of a bond, I consider to be an exception and not a rule; property may pass without

writing either as a *donatio mortis causá*, or by a nuncupative will according to the forms required by the statute. The distinction between a *donatio mortis causá* and a nuncupative will is, that the first is claimed against the executor and the other from the executor. Where delivery will not execute a complete gift *inter vivos*, it cannot create a *donatio mortis causá*, because it will not prevent the property from vesting in the executors; and as a Court of Equity will not *inter vivos* compel a party to complete his gift, it will not compel an executor to complete the gift of his testator. The delivery of a mortgage cannot pass the property *inter vivos*:—first, because the action for the money must still be in the name of the donor; and secondly, because the mortgagor is not compellable to pay the money without having back the mortgaged estate, which can only pass by the deed of the mortgagee, and no Court would compel the donor to complete his gift by executing such a deed. As to the case where a bond accompanied the mortgage deed” (I shall have occasion to state presently the distinction between the two mortgages), “I was at first inclined to think that as the bond alone, if it had been the only security for the debt, would under the decisions have passed as a *donatio mortis causá*, so it would draw after it the mortgage as being a collateral security for the same debt,—but upon further consideration I think that the delivery of the bond, where there is also a mortgage, cannot be considered as a gift completed. The mortgagor has a right to resist the payment of the bond without a re-conveyance of the estate, and it cannot be maintained that the donor of the bond would be compelled to complete his gift by such re-conveyance.”

The principle which is applied in the decision of

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this case, is the principle upon which Courts of Equity refuse to complete voluntary conveyances. No Court of Equity will compel a completion of them, and throughout the whole of what I have now read, the donor is considered as a party who may refuse to complete the intent he has expressed; but I think that is a misapprehension, because nothing can be more clear than that this *donatio mortis causá* must be a gift made by a donor in contemplation of the conceived approach of death,—that the title is not complete till he is actually dead, and that the question therefore never can be what the donor can be compelled to do, but what the donee in the case of a *donatio mortis causá* can call upon the representatives, real or personal, of that donor to do; the question is this, whether the act of the donor being, as far as the act of the donor itself is to be viewed, complete, the persons who represent that donor, in respect of personality—the executor, and in respect of realty—the heir-at-law, are not bound to complete that which, as far as the act of the donor is concerned in the question, was incomplete; in other words, where it is the gift of a personal chattel or the gift of a deed which is the subject of the *donatio mortis causá*, whether after the death of the individual who made that gift, the executor is not to be considered a trustee for the donee, and whether on the other hand, if it be a gift affecting the real interest,—and I distinguish now between a security upon land and the land itself,—whether if it be a gift of such an interest in law, the heir-at-law of the testator is not by virtue of the operation of the trust, which is created not by indenture but a bequest arising from operation of law, a trustee for that donee. I apprehend that really the question does not turn at

all upon what the donor could do, or what the donor could not do; but if it was a good *donatio mortis causâ*, what the donee of that donor could call upon the representatives of the donor to do after the death of that donor.

With respect to the question of fact, whether those mortgages and the bond were or were not given in such a manner as constituted a good *donatio mortis causâ*, if there be no objection to the fact, that the subject of the mortgage was an interest in real estate, I do not apprehend that the gentlemen at the bar, though they criticised very much the nature of the evidence which has been given, meant to ask for any issue to try whether there was or was not a good *donatio mortis causâ*, if a mortgage can be the subject of a *donatio mortis causâ*. In some of the cases which I shall have occasion to mention, it will be seen that where there is any doubt whether in point of fact there was that which would constitute a good *donatio mortis causâ*, if in point of law the subject of it can be made the subject of a *donatio mortis causâ*, it is a very familiar thing to direct an issue or issues to try that fact. That not having been desired, the case is to be considered on its merits. Supposing the testator to have the power, has he fallen into a mistake with respect to the subject which he did intend so to give, and has he attempted to make a good *donatio mortis causâ* of property which he could not so transfer?

It is necessary to state, first, what these two mortgages are, for they differ in their nature. The first is a mortgage for a sum of between 2,000*l.* and 3,000*l.*, and there is the usual bond. The other is the case of an interest conveyed by indentures of lease and release and assignment, the contents of

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which are such as I am about to state. There being property considerably more than 30,000*l.* vested in trustees under a marriage settlement, they have advanced 30,000*l.* to Sir Edwin Bayntun Sandys upon a mortgage of his estates and a bond, and judgment recovered upon that bond. The person who is supposed to have made this gift *causâ mortis* afterward advanced to the mortgagee that sum of 30,000*l.*, the mortgagor joining in the trust assignment of the mortgage. There was first an assignment of the money, the 30,000*l.*; secondly, an assignment of the judgment; and, thirdly, it contained a covenant to pay the money secured by the mortgage, which covenant formed a species of debt affecting the inheritance—the subject of the assignment to Mr. Elwes.

It appears that Mr. Elwes had been extremely angry with his daughter, who had married Mr. Duffield; but towards the close of life, and particularly when he came very near his death, he became very desirous to make a larger provision for his daughter; and, accordingly, in a conversation which he had upon the subject, he mentioned that there were these mortgages, one of two thousand odd hundred pounds, and another of thirty thousand pounds. Nobody, I think, who looks to the evidence, can doubt that it was his intention to make a gift of those mortgages for the benefit of that daughter whom he had restored to his favour, and, accordingly, he stated his purpose. He died the next morning. He was at the time in circumstances in which, it is clear, he apprehended that his death was approaching, and being extremely desirous to make some provision for his daughter, in the course of that morning he stated an intention upon the subject, which could leave no doubt in the mind

of any body what that intention was. It occurred afterwards that a declaration of this purpose should be made, and the question is, whether the form of that declaration was sufficient to constitute a gift of the property? There was no time to draw out a regular transfer of the property, but in the course of the morning there were brought to him the instruments,—the mortgages, the bonds, and so on; and it being suggested that it was necessary, in order to make a good *donatio mortis causá*, that there should be delivery of the instruments, subject to the question, whether such delivery constituted a good *donatio mortis causá*; it appears by the evidence of the gentleman who had all these instruments in his hand, that Mr. Elwes took the hand of his daughter and laid it upon these instruments. The evidence presents an accurate account of the clear manifestation of his purpose to give, although that manifestation was accompanied with this circumstance—that he was so near the termination of his life, and so reduced, that he could hardly utter the words, but that it was more by a look than a word that he expressed his approbation of what was done. This was therefore a case where one cannot help feeling a very strong wish that it should take effect; but, it must be remembered, we cannot give that effect unless the law enables us to do it.

Improvements in the law, or some things which have been considered improvements, have been lately proposed; and if, among those things called improvements, this *donatio mortis causá* was struck out of our law altogether, it would be quite as well; but that not being so, we must examine into the subject of it.

I apprehend that the question is not a question between the donor and donee, but that the question is, whether the act is complete to this extent—that the

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donor gave this in such a manner as to constitute a good *donatio mortis causá* which will bind the interest in the executor as to the personal estate, and bind the interest in the heir-at-law with respect to the mortgage security as to the real estate? Because, I apprehend that in a case where a *donatio mortis causá* has been carried into effect by a Court of Equity, that Court of Equity has not considered the interest as vested by the gift, but that the interest is so vested in the donee, that that donee has a right to call on a Court of Equity, and, as to the personal estate, to compel the executor to carry into effect the intention manifested by the person he represents. The only authority it will be necessary to cite for that doctrine is referred to in this decision. The case of *Gardner v. Parker*,* is a decision by the same Judge, and was under these circumstances :—It was a gift of a bond by delivering the same and saying, “There, take that and keep it,” in the last sickness of the donor—the donor dying two days afterwards. This was held to be a *donatio mortis causá*, and it was directed that the donee should be at liberty to use the executors’ names in suing on the bond, he indemnifying them, and the costs of the suit to be paid out of the testator’s estate, which is founded on this reason, that the money may be recovered in a proceeding at law, by an action in the name of the executors; but if the executors refuse to permit their names to be used, a Court of Equity will compel them to permit their names to be used in consequence of the trust which arises from the act of the donor himself.

In another case of *Snellgrove v. Bailey*,† “A bond for 100*l.* was given by one Sparkman to Sarah

* 3 Madd. 184.

† 3 Atk. 214.

Bailey, which Sarah Bailey delivered to the defendant, saying, 'In case I die, it is yours, and you will have something.' The plaintiff, as administrator to Sarah Bailey, brought a bill to have the bond delivered up." There was a question whether there had been a *donatio causá mortis*, and the administrator there brought a bill to have the bond delivered up, as being in the hands of the alleged donee. Lord Hardwicke, however, decided, that this was a sufficient *donatio causá mortis* to pass the equitable interest, not the legal interest in the bond, upon the intestate's death. I find that Lord Hardwicke, in the case where there was a gift in the nature of a *donatio mortis causá*, directed that the representatives should be at liberty to file a bill to have the deeds delivered up, although he said they might bring *trover* for the deeds: but if the act of the donor had vested the deeds in the hands of the person in such a manner as to give an interest in the nature of a *donatio mortis causá*, there could be no equity to obtain the delivery up of those deeds unless the title had been settled at law.

The real question in this case is—not whether this was good as a *donatio causá mortis*, if the subject of delivery had been a bond alone, but whether the subject of delivery being mortgages, that is, estates in land in one sense of the word, such interests in land as those are can or cannot be made the subject of a *donatio causá mortis*?—A question which is left in a state of great uncertainty—a question noticed in some cases, but still left in a state of great difficulty; and I cannot but extremely lament that there should have been a decision upon a question of this importance with so little said either in argument or judgment upon the bearings of the cases to be found

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with reference to this subject. Upon looking into the cases, I observe that in the very first case I can find Lord Hardwicke to have decided, he expressed more doubt upon the subject than, in my humble judgment, speaking with great deference when looking at that great man's authority, former decisions upon the subject would have induced me to expect to find in his Lordship's expressions.

In the case of *Hassel v. Tynte*,* in which a lady claimed to have a sum of 1,000*l.* secured by mortgage, which she said she had become entitled to by a *donatio causâ mortis* made by the donor (the testator is a wrong term in such a case)—there were two questions, one was a question of fact, namely, whether the circumstances were such as to constitute it a gift, if it was a proper subject of gift? The other—whether it was a proper subject of gift? Lord Hardwicke expressed a doubt whether a mortgage deed could be made the subject of a *donatio causâ mortis*, and he finished the case by saying, “I observe that this lady, when she becomes twenty-one, is to be the residuary legatee of the testator, and as she will very soon attain the age of twenty-one, I will not keep up this controversy between her as claiming this 1,000*l.* and the person entitled to the residue if she dies under twenty-one; the probability is she will arrive at the age of twenty-one, and then, as residuary legatee, she will be entitled to all the residue, and then it will become unnecessary to determine whether this 1,000*l.* shall be settled upon her or not.”

In the case of *Ward v. Turner*,† which is a leading case upon this subject, Lord Hardwicke entered into a very long consideration of the case in his judgment.

* Amb. Rep. 318.

† 2 Ves. sen. 431.

The question there was, whether some receipts for stock having been delivered over, it was a good *donatio causâ mortis*? He was of opinion it was not; that the mere certificate of the stock was not a document of the title, and where no document of the title has been delivered there can be no transfer of the property, and he held that that was not a good *donatio causâ mortis*.

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In *Richards v. Symes** Lord Hardwicke is represented as having decided, that if a mortgagee gave to his mortgagor the deeds of the mortgage, and that fact was proved, that was a gift of the money for which the deeds were a security, and not within the statute of frauds. Now the whole, or the greater part of the difficulty in determining whether the gift of a mortgage can be a good *donatio causâ mortis*, turns upon this,—that the question arises how far the statute of frauds will allow of that. Lord Hardwicke was of opinion, according to this case of *Richards v. Symes*, that if a mortgagee gave to a mortgagor the deeds, the statute of frauds would not stand in the way; he held clearly that the mortgagee cannot get back the deeds from the mortgagor; then he said that the documents, the deeds being in the hands of the mortgagor, though the estate in the land was still in the mortgagee, yet by operation of law a trust would be created in the mortgagee to make good a gift of the debt to the mortgagor, to whom he had delivered the deeds, as the evidence that he forgave the debt and gave it up. We must consider the difference between the actual estate and a mortgage—and recollect that although a mortgage vests an estate in land, (a fee simple mortgage of course vests

* 2 Atk. 319, 3 Barnard. 90, and 2 Eq. Ca. Abr. 617.

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a fee simple estate in land,) yet it may be represented that there are two estates, one in the mortgagor and another in the mortgagee. A mortgage, for instance, does not revoke the will of the testator. A mortgage does not give dower—it is, in truth, nothing more than a pledge, and if the right to the principal is divested out of the mortgagee by a valid act to divest the right of the principal, the other is considered as what they call an accident, and then the question arises—not whether the land can be got out of the mortgagee without a conveyance, but whether, if the land is to be considered as still remaining vested in the mortgagee, he is not, by operation of law, a trustee for the mortgagor, bound to answer the subpoena of that mortgagor to reconvey the estate to him, and to execute the requisites of the statute of frauds.

In the case of *Hassell v. Tynte*, Lord Hardwicke makes the observation in giving his judgment:—that the case of *Richards v. Symes* was not a precedent of very considerable value; because, he says, that he had directed issues to try whether there was a gift by the mortgagee to the mortgagor, and those issues having ended in deciding that there was not, he considered that a precedent of very little authority. I consider it, however, as a precedent of very considerable authority in such a case as this. It is reported at length in Barnardiston's Chancery Cases, and when I mention that reporter, I am sorry to have to add, that I am old enough to remember Lord Mansfield, who practised under Lord Hardwicke, by whom all these cases were decided, state his opinion of these reports, for he knew the man. I take the liberty of saying, that in that book there are reports of very great authority. The case happens to be reported likewise in

another book of no very high character. I mean the second volume of the Equity Cases abridged. It is not so high in character as the first volume of the Equity Cases abridged; but the case as there reported, is reported from a manuscript note, and from a manuscript note which I think is better entitled to credit for this reason; that having called in assistance in this case (which I believe will be the first absolute determination upon the subject, though I think there is a great deal laid down in the cases which ought to lead us to decide what ought to be a good *donatio mortis causá*), I have found authority to consider that report to be a very correct report, in the library and in the mind, which are both equally large storehouses of equity learning—I mean the library and mind of Lord Redesdale. Upon this occasion, he has had the goodness to hunt through all the books he has upon the subject, as well manuscript as printed, and I come to the foundation of my opinion, with all the assistance I can have from that quarter.

According to both the reports, an issue had been directed. If there had been a good delivery, Lord Hardwicke seems to consider that the interest in the land would have passed: “But in all these cases,” he says, “there is a difference, both at law and in equity, between absolute estates in fee or for a term of years, and conditional estates for security of money. In the case of absolute estates, it cannot be admitted that parol proof of the gift of deeds shall convey the land itself. But where a mortgage is made of an estate, that is only considered as a security for the money due, the land is the accident attending upon the other (and principal object), “and when the debt is discharged the interest in the land follows of course.” A trust

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of the land then arises by operation of law : when a deed is given a trust also arises by operation of law. " At law, the interest in the land is thereby defeated, and in equity a trust arises for the benefit of the mortgagor : " and his Lordship said, that " if an obligee delivers up a bond with intent to discharge the debt, the debt will certainly be thereby discharged, and the mortgage with it ; " and if the bond is discharged in the present case, it is very difficult to say that the mortgage debt, as debt, will not be discharged also.

In reasoning the case of *Ward v. Turner*, and pointing out the distinction there is between the delivery of a mere chattel, and the delivery of any thing which forms part of the title, Lord Hardwicke says this—and I find by a manuscript note in the possession of the noble Lord I have mentioned, that this is exceedingly correct—" Suppose it had been a mortgage in question, and a separate receipt had been taken for the mortgage money, not on the back of the deed (which was a very common way formerly, and is frequently seen in the evidence of ancient titles), and the mortgagee had delivered over this separate receipt for the consideration money, that would not have been a good delivery of the possession, nor given the mortgage *mortis causâ*, by force of the act."* To be sure, that reasoning is quite idle, unless Lord Hardwicke meant to say that delivery of the deed, with a receipt upon the back of it, not by force of the delivery of the receipt on the back of it, but by force of the delivery of the deed, would be a good *donatio causâ mortis*.

The case of *Richards v. Symes* was argued by Lord Mansfield, then Mr. Murray. The case of *Ward v. Turner* was also argued by Lord Mans-

* 2 Ves. 443.

field, then Mr. Murray; and he appears to have a strong recollection of it, when he got into the Court of King's Bench, where sometimes equity has been rather more misunderstood than it ought to be, which has perhaps led some men belonging to that Court to abuse equity, when they knew nothing about the matter. There is a case in the second volume of Burrows' Reports*—a case of very great importance—a case in which a man devised lands: the will, I think, was not attested by three witnesses, but he described the object of his devise of land. There was enough in his will to shew that he meant to pass the personal interest in his property, and it was a question, whether there was a good devise of the mortgage or not. The land itself could not be said to be devised; but the Court of King's Bench held that it was a very good bequest of the personal interest: and Lord Mansfield, in summing up all this sort of doctrine, says—"A mortgage is a charge upon the land, and whatever would pass the money will carry the estate in the land along with it to every purpose." (That I admit is equity.) "The estate in the land is the same thing as the money due upon it—it will be liable to debts—it will go to executors—it will pass by a will not made and executed with the solemnities required by the statute of frauds. The assignment of the debt or forgiving it, will draw the land after it as a consequence: nay, it would do it, though the debt were forgiven only by parol, for the right to the land would follow notwithstanding the statute of frauds."

I ought to do it in a spirit of great humility, when I question the doctrine of Lord Mansfield. If he meant by that to say that such acts done with the

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* Martin v. Mowlin, 2 Burr. 979.

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money will have the effect in a Court of Equity of enabling you to call for a conveyance of land, I am ready to agree with him ; but to say that the land is to be considered as passing under such circumstances is that to which I cannot agree ; but still I maintain that the doctrine from first to last is correct, provided you lay the foundation in the intent of the gift, that the debt is well given or well forgiven ; and then, as the result of that interest so given, you say that the party who has the land becomes in equity a trustee for the person entitled to the money and to the personal estate.

Lord Hardwicke, with respect to the bond (and it is necessary that I should take some notice of this, because there has been a change in the law which that great judge did not foresee, but which, in later times, and in my own time, has become very familiar in the courts of law,)—Lord Hardwicke states, as one ground of his opinion in the case of the bond, that it is a good gift *causá mortis*, because he says he who has got the bond may do what he pleases with it. He certainly disables the person who has not got the bond from bringing an action upon it : for, says Lord Hardwicke, no man ever heard—(and I have seen in the manuscript of the same Lord Hardwicke, that he said no man ever will hear)—that a person shall bring an action upon a bond without the *profert* of that bond ; but we have now got into a practice of sliding from courts of equity into courts of law, the doctrine respecting lost instruments ; and I take the liberty most humbly of saying, that when that doctrine was so transplanted, it was transplanted upon the idea, that the thing might be as well conducted in a court of law as in a Court of Equity,—a doctrine which cannot be held by any person who knows what

the doctrine of Courts of Equity is as to a lost instrument.

Then, if the delivery of a bond would, as it is admitted, (notwithstanding any change in the doctrine about *profert*)—if the delivery of a bond would give the debt in that bond, so as to secure to the donee of that bond the debt so given by the delivery of the bond, the question is, whether the person having got, by the delivery of that bond, a right to call upon the executor to make his title by suing or giving him authority to sue upon the bond, what are we to do with the other securities if they are not given up? But there is another question to which an answer is to be given:—what are we to do with respect to the other securities, if they are delivered? In the one case, the bond and mortgage are delivered; in the other the judgment, which is to be considered on the same ground as a specialty, is delivered—with that, the evidences of the debts are all delivered. The instrument containing the covenant to pay is delivered. They are all delivered in such a way that the donor could never have got the deeds back again. Then the question is, whether, regard being had to what is the nature of a mortgage, contradistinguishing it from an estate in land, those circumstances do not as effectually give the property in the debt as if the debt was secured by a bond only?


The opinion which I have formed is, that this is a good *donatio mortis causá*, raising by operation of law a trust; a trust which being raised by operation of law, is not within the statute of frauds, but a trust which a Court of Equity will execute; and therefore, in my humble judgment, this declaration must be altered by stating that this lady, the daughter, is entitled to the benefit of these securities, and with a

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direction to the Court of Equity to proceed in the cause, on the ground of the principle to be found such a declaration to be made by your Lordship which, with respect to that part of the case, I take the liberty to advise your Lordships to adopt.

29 June, 1827. Ordered and adjudged by the Lords spiritual and temporal in Parliament assembled, that the said decree of the Court of Chancery of the 17th April, 1823, be, and the same is hereby reversed, in so far as it declares, "That the said Court being of opinion that a mortgage security cannot by law be given by way of *donatio mortis causa*, the Plaintiff, Emily Frances Duffield, is not entitled to the mortgage monies secured by the indentures of the 2d and 3d days of November, 1820, and the said bond of the 12th day of July, 1820, and by the said indentures of lease and release and mortgage dated the 11th and 12th days of July, 1820." And it is further ordered, that the said cause be referred back to the Court of Chancery, to proceed therein in such manner as shall be consistent with this Judgment.

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TIMOTHY POWELL, JOSHUA POWELL,
and THOMAS HUNGERFORD POWELL, } *Plaintiffs.*
surviving partners of ROBERT }
MITCHELL, deceased - - - - - }

JOSEPH MARIA SONNET, ANTONIO }
BERNIS, and JOSEPH MARIA BERNIS, } *Defendants.*
surviving Partners of FRANCISCO }
BERNIS, deceased - - - - - }

Upon immaterial issues it is not necessary that verdicts should be given. The jury may be discharged from giving such verdicts without consent of the parties.

THIS was a writ of error, brought on the affirmance by the Exchequer Chamber of a judgment of the Court of King's Bench, in an action of *assumpsit*.

The action was commenced in Michaelmas Term, 1824, issue was joined as of Hilary term, 1825, and the cause was tried in the vacation after Hilary Term, in that year.

The declaration consisted of twenty counts. The twelve first counts were for special damages, alleged to have been sustained by the Plaintiffs below, and their late partner, Francisco Bernis, in his lifetime, and by them after the death of their late partner, in the sale by the Defendants below, and their late partner, Robert Mitchell, of a quantity of wool consigned to them by the Plaintiffs below, and their late partner, Francisco Bernis, for sale. The 13th, 14th,

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15th, and 16th counts, were for money paid, laid out, and expended; money had and received; money due for interest, and upon an account stated in the lifetime of Francisco Bernis and Robert Mitchell; and the 17th, 18th, 19th, and 20th counts were similar counts, except that they were laid after the deaths of Francisco Bernis and Robert Mitchell. The Defendants below put in several pleas. To the first sixteen counts of the declaration, they pleaded the general issue, and to the four last counts, they also pleaded the general issue; they then pleaded the statute of limitations to the whole declaration, and to the eight last counts they pleaded a set off.

Upon the two first pleas the Plaintiffs below joined issue; to the third plea they replied, that before and at the time when the several causes of action in the declaration mentioned arose, the Plaintiffs below resided, and from thence had been resident beyond the seas, and that Francisco Bernis at the time when the causes of action in the first sixteen counts mentioned arose, and from thence until the time of his death, was resident beyond the seas; and to the last plea they replied, that they were not indebted to the Plaintiffs below in the manner and form pleaded: on which issue was joined.

To this replication of the Plaintiffs below as to the third plea, so far as the same related to the first sixteen counts of the declaration, the Defendants below rejoined, that the Plaintiffs below and Francisco Bernis were not resident beyond the seas, on which issue was joined; and so far as the same related to the four last counts, the Defendants below rejoined, that the Plaintiffs below were not resident beyond the seas, on which also issue was joined.

On the trial of the cause below, a verdict was found for the Plaintiffs below, on the general issue, as to the twelve first counts of the declaration; with 24,000*l.* damages, and for the Defendants below, on the general issue, as to the 13th, 14th, 15th, and 16th counts; and also on the general issue, as to the four last counts of the declaration. And as to the issue joined on the rejoinder of the Defendants below, to the replication of the Plaintiffs below, to the third plea of the Defendants below, so far as the same related to the twelve first counts of the declaration, a verdict was found for the Plaintiffs below; but as to the same issue, so far as it related to the 13th, 14th, 15th, and 16th counts of the declaration, and also as to the issue joined on the rejoinder of the Defendants below, to the replication of the Plaintiffs below, to the third plea of the Defendants below, so far as it related to the four last counts of the declaration; and also as to the issue joined on the replication of the Plaintiffs below, to the last plea of the Defendants below, as to the eight last counts of the declaration, the Jurors were discharged from giving any verdict.

In Easter Term, 1825, judgment was given in the Court of King's Bench, for the Plaintiffs below, as to the twelve first counts of the declaration, and for the Defendants below, as to the eight last counts. Upon this judgment a writ of error was brought in the Exchequer Chamber, and the Plaintiffs in error assigned for error the common errors, and also that it appeared by the record, that as to the eight last counts of the declaration and the several issues respectively joined thereon, *the Jury were discharged from giving their verdict thereon; nevertheless it did not appear in and by the record, that the*

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Plaintiffs in error consented that the Jury should be so discharged.

In Michaelmas Term, 1825, the Court of Exchequer Chamber affirmed the judgment of the Court of King's Bench.

Upon this judgment of affirmance, the Plaintiffs in error brought their writ of error in Parliament, and assigned for error the common errors, and also that by the record it appeared, that as to the issue joined between the parties on the rejoinder of the Defendants below, to the replication of the Plaintiffs below, to the plea of the Defendants below, by them thirdly pleaded, so far as the same relates to the 13th, 14th, 15th, and 16th counts of the declaration ; and also as to the issue joined between the parties upon the said rejoinder of the Defendants below, to the replication of the Plaintiffs below, to the plea of the Defendants below, by them thirdly pleaded, so far as the same relates to the last four counts of the said declaration ; and as to the issue joined between the parties on the replication of the Plaintiffs below, to the plea of the Defendants below, by them lastly pleaded, as to the several promises and undertakings in the eight last counts of the said declaration mentioned, *the Jury were discharged from giving any verdict thereon, nevertheless it did not appear in and by the said record, that the Defendants below consented that the Jury should be so discharged.* And also, that by the said record it appeared that as to the several issues thirdly and lastly joined between the parties, *the Jury were discharged from giving any verdict thereon, nevertheless it did not appear in and by the said record that the Defendants below consented that the Jury should be so discharged.*

The Defendants in error pleaded *in nullo est erratum*.

For the Plaintiffs in error—*The Solicitor-General and Mr. Pattison*.

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After the Jurors appointed to try the cause below, had been sworn to try the several issues joined between the parties in the cause, and a true verdict give according to the evidence, it was not competent for the Court below to discharge the Jurors from giving any verdict, as to any of the issues, without the consent of the parties, and it does not appear that the Plaintiffs in error consented to their being so discharged.

By such discharging the Jury the situation of the Plaintiffs in error, as to their claim for costs, has been altered. For the Jurors having returned a verdict for the Defendants in error, on all the issues joined between the parties, so far as they relate to the twelve first counts of the declaration, the Defendants in error became intitled to the general costs of the cause, deducting the costs of such issues as were found for the Plaintiffs in error; but in consequence of the Jurors being discharged from finding any verdict on the special issues joined between the parties, as to the eight last counts of the declaration, the Plaintiffs in error have been chargeable with the cost of such special issues, instead of the same being deducted as they would have been, had the Jurors found a verdict for the Plaintiffs in error thereon, as they ought to have done.

For the Defendants in error—*Mr. Gurney, Mr. Brodrick (and Mr. Tidd)*.

The jury having found a verdict for the Defendants in error, on the issue joined on the first plea, so far as the same relates to the promises and

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undertakings in the first twelve counts of the declaration mentioned, with 24,000*l.* damages, and costs of suit, and for the Plaintiffs in error, on the same issue, so far as it relates to the promises and undertakings in the thirteenth, fourteenth, fifteenth and sixteenth counts, and also on the issue joined on the second plea, as to the promises and undertakings in the last four counts of the declaration ; and having also found a verdict for the Defendants in error, on the issue joined on the rejoinder to the replication to the plea of the Statute of Limitations, as to the first twelve counts of the declaration, it became, and was wholly immaterial and unnecessary for the jury to find any verdict on the last-mentioned issue, as to the thirteenth, fourteenth, fifteenth, and sixteenth counts, or on the issue joined on the rejoinder to the Replication to the last-mentioned plea, as to the last four counts of the declaration, or on the issue joined on the replication to the plea of set off, as to the several promises and undertakings in the last eight counts of the declaration mentioned ; and the jurors were therefore properly discharged from giving any verdict thereon.*

The jury having so found a verdict for the Plaintiffs in error, on the issue joined on the first plea, so far as the same relates to the promises and undertakings in the thirteenth, fourteenth, fifteenth, and sixteenth counts ; and also on the issue joined on the second plea, as to the promises and undertakings in the last four counts of the declaration mentioned, and thereby negatived the supposed causes of action in the thirteenth, fourteenth, fifteenth, and sixteenth, and also in the last four counts respectively mentioned, could not have found whether the Defendants

* See Barnes, 461. 2 H. Blac. 393. 2 Barn & Ald. 546.

in error, and Francisco Bernis, were or were not at the respective times, when those several causes of action did respectively accrue to them in parts beyond the seas;* or that the Defendants in error, before or at the time of the commencement of the action, were indebted to the Plaintiffs in error, in any sum of money exceeding the damage sustained by the Defendants in error, by reason of the not performing of the several supposed promises and undertaking in the last eight counts of the declaration mentioned.

If the jury had found a verdict for the Plaintiffs in error, on the issue joined on the rejoinders to the replication to the plea of the Statute of Limitations, as to the thirteenth, fourteenth, fifteenth, and sixteenth, and last four counts of the declaration, or on the issue joined on the replication to the plea of set-off, as to the several promises and undertakings in the last eight counts of the said declaration mentioned, the Plaintiffs in error would not have been entitled to any costs thereon. *Postan v. Stanway, Extrix*,† *House v. Thames Commissioners*,‡ *Edwards v. Bethel*.§

At common law,|| it was sufficient if the substance of the issue were found, or so much of it as would have maintained the action or defence. And since the statute, 4 Anne, c. 16, sec. 4, which allows the Defendant to plead several matters, if any one or more of the issues joined on several pleas be found for the Plaintiff or Defendant, which entitle him to judgment on the whole record, the Court will give judgment thereon, notwithstanding there be no verdict,

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* 2 H. Blac. 246. † 5 East, 261. ‡ 3 Brod. & Bing. 117.
§ 1 Barn. & Ald. 254. || Com. Dig. Title, Pleader S. 27.

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or a bad or imperfect verdict on other issues, the finding upon which, in consequence becomes immaterial. *Bartlett v. Spooner*,* *Barber v. Dixon*,† *Cossey v. Diggons*,‡ *Rawlins*.§

As it appears by the *postea*, returned by the Chief Justice, before whom the cause was tried, and is certified by him, as part of the proceedings at the trial, that the jurors were discharged from giving any verdict as to the issues joined on the rejoinder to the replication to the third plea of the Statute of Limitations, so far as the same relates to the thirteenth, fourteenth, fifteenth, and sixteenth, and last four counts of the declaration, and also on the issue joined on the replication to the last plea of set off, as to the several supposed promises and undertakings in the last eight counts of the declaration, it must be presumed, that the jurors were duly and rightly discharged from giving any verdict thereon.||

The Plaintiffs in error could not have sustained any damage by the jurors having been so discharged from giving any verdict on the last-mentioned issues; and, it was not the business of the Defendants in error, but of the Plaintiffs in error, to have the last-mentioned issues determined, if they had been so disposed, or imagined that thereby they might be entitled to costs, or any other advantage.¶

The Lord Chancellor (Lyndhurst).—The jury having found a verdict for the Plaintiffs on the material issues, the cause was in substance at an end. To what purpose should any thing further have been done.

The consent of parties to the discharge of the jury, is now held unnecessary. The judges of their own authority in many modern cases have dis-

* Barnes, 461. † 1 Wils. 44. ‡ 2 Barn & Ald. 546.

§ 2 H. Blac. 394, (n). || 3 Bing. 381. ¶ Barnes, 462.

charged the jurors without finding verdicts upon all the issues, and without consent of parties. Applications upon this ground for new trials have frequently been refused, which is, in principle and substance, the same thing.

Judgment affirmed, with £ costs.

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ENGLAND.

(CHANCERY.)

JOHN VERNON, Esquire - - - - *Appellant.*

The Right Honourable JOHN Earl of }
 EGMONT, ARCHIBALD MORTON, and } *Respondents.*
 ARCHIBALD RODICK - - - - }

E. being tenant for life under a deed of settlement, with a power to lease under certain restrictions, grants leases not in conformity with the power and dies, leaving by will the residue of his personalty J. E. his son, the next remainderman under the settlement.

J. E. having called upon the executors to pay the residue, they require an indemnity against the contingent claims of the tenants in case of eviction, and upon the refusal of J. E. to give such indemnity, he files a bill against them for an account and payment of the residue.

Held, (reversing the judgment of the court below) that as J. E. had the power to disturb the leases, he was bound either to confirm them, or to give the indemnity required, and that the executor had a right to hold the residue, till he obtained the confirmation or indemnity.

ON the 2d day of November, 1822, the Respondent, the Earl of Egmont, filed his original bill against the Appellant, stating the will of his father, John James, late Earl of Egmont, dated the 26th July, 1813, whereby, amongst other things, he gave and bequeathed to his wife Isabella Countess of Egmont, during her life, one annual sum of 500*l.*, to be chargeable upon and payable out of the manors of Spaxton, Aley, and Plansfield, in the county of Somerset, (except the estates comprised in his marriage settlement) and subject thereto, and also charged with the sum of

12,000*l.* due on mortgage of the said estates, or some part thereof; the testator devised the same to the use of his son the Respondent, then John Lord Viscount Percival, and the heirs male of his body with various remainders over; and after reciting that he was entitled to the reversion in fee simple of and in divers estates in the said county, and also of other estates in the county of Cork, in the Kingdom of Ireland as therein mentioned, he gave and devised the same to the same uses as before expressed concerning his estates in the county of Somerset; and after bequeathing to his wife as therein is mentioned, directed that the monies in the hands of his bankers should be applied in payment of his debts, (except mortgage debts, which were to be raised out of the estates whereon the same were respectively charged) and of the legacies given by his will, and such other legacies as he might give by any codicil thereto. The surplus of such monies and all other his monies and personal estate, he gave to his son the Respondent; and he appointed his wife and the Appellant executrix and executor of his will, and gave the Appellant 100*l.* for his trouble in the execution of his will.

The bill further stated that the testator by a codicil to his will, dated the 5th of May, 1820, gave to Elizabeth White, then in his service, an annuity or yearly sum of 150*l.* during her life, and for securing the same, directed his executors, out of his personal estate, to invest a sufficient sum in their names to produce such annuity; and he gave the interest of the sum so to be invested to the Respondent, John, Earl of Egmont, until the decease of his (the testator's) wife; and he likewise gave to the Respondent the principal and any arrear of interest on the decease of Elizabeth White. The bill further stated, that Isabella, Countess of Egmont, died in the lifetime of the testator, whereby all the

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bequests given to her by the will lapsed; that the testator died in the month of February, 1822, without having altered or revoked the codicil; and that the Appellant duly proved the will and codicil in the proper Ecclesiastical Court.

The bill prayed that an account might be taken of the personal estate and effects of the testator, and of all such parts thereof as were possessed or received by the Appellant, or by any person by his order or for his use, and the funeral and testamentary expences of the testator and of his debts, as well those due on mortgage as others, and of the legacies and annuities bequeathed by his will and codicil; and that a competent part of the personal estate might be applied in the payment and discharge of such of the testator's debts and legacies as then remained unsatisfied, if any such there were; and that a competent sum of money might be set apart and invested, if the same had not already been done, in the purchase of stock in the public funds to answer the annuity of 150*l.*, and that the clear residue of the testator's personal estate and effects might be ascertained and paid to the Respondent, John, Earl of Egmont, as such residuary legatee, and that all proper and necessary accounts might be taken, and directions given for effectuating the said purposes.

The Appellant, John Vernon, on the 10th day of December, 1822. put in his answer to the Respondent's bill, and thereby admitted the will and codicil, the decease of the Countess of Egmont and of testator, that the Appellant had proved the will and codicil, and had possessed himself of the personal estate and effects of the testator, or as much as he was able, and had, out of the produce thereof, paid the funeral and testamentary expences of the testator, and such of his debts as had come to the Ap-

pellant's knowledge, and had set apart and invested a sufficient sum of money to secure the payment of the annuity of 150*l.* and certain other annuities which the testator before his death desired might be paid to certain of his servants; which annuities the Respondent, by deed under his hand and seal, dated the 4th day of March, 1822, authorised the Appellant to pay and provide for out of the testator's personal estate; and that after such payment and appropriation, and after retaining the legacy of 100*l.* bequeathed to the Appellant by the will, there remained in the hands of the Appellant a considerable surplus of the testator's personal estate and effects: but the Appellant submitted whether he ought to have paid over such surplus to the Respondent, in as much as he had received a formal notice from Messrs. Morton and Rodick of an assignment by way of mortgage, bearing date the 19th day of April, 1822, whereby the Respondent assigned to Archibald Morton and Archibald Rodick all the monies and balances of the testator at the time of his decease, in the hands of his bankers, and all other the personal estate bequeathed to the said Respondent by the said will for securing to the said Archibald Morton and Archibald Rodick the sum of 2,031*l.* 10*s.* and interest.

The Appellant by his answer further stated, that the testator, being tenant for life of certain real estates in the county of Somerset, and also in the kingdom of Ireland, with remainder to the Respondent, John, Earl of Egmont, in tail, with powers to the testator, under certain restrictions, to grant leases of the estates; he, the testator, had granted various leases of the estates, with covenants for quiet possession; and that such leases, or some of them, were not warranted by the power which the testator possessed;

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and the Appellant, having been informed that the Respondent intended to avoid the leases, and being apprehensive that he, the Appellant, would be liable to costs and damages as executor of the testator, in actions to be brought by the tenants, under these circumstances submitted, that some indemnity should be provided against such claims, before he paid to the Respondent, the Earl of Egmont, the balance of the testator's personal property.

The bill was afterwards amended, and the Respondents, Archibald Morton and Archibald Rodick, were made Defendants, who put in their answer, claiming to be paid a debt due to them from the Respondent, the Earl of Egmont, out of what might be found due to him in respect of the residue of his father's estate.

On the 15th February, 1823, the cause was heard at the Rolls, when a decree was made, directing an account of the personal estate of the testator, not specifically bequeathed, which had come to the hands of the Appellant, the surviving executor, or to the hands of any person or persons by his order or for his use; and it was ordered that the Master should also take an account of the testator's debts, funeral expences, and legacies, and of the annuities given by his will and codicil, and that the personal estate of the testator, not specifically bequeathed, should be applied in payment of his debts and funeral expences, and then in payment of his legacies and of the arrears of the annuities given by his will and codicil; and it was ordered that the Master should enquire and state to the Court whether there were any and what claims affecting the testator's personal estate in the hands of the Appellant, in respect of any leases executed by the testator not in conformity with his power of

leasing; and the Master was to be at liberty to state any special circumstances relating thereto as he should think fit; and it was further ordered that the Master should ascertain and certify of what the clear residue of the testator's personal estate would consist, and the Court reserved the consideration of all further directions and of the costs of the suit until after the Master should have made his report.

In pursuance of the decree, the Master made his report on the 20th February, 1824, and thereby stated, among other things, that the sum of 585*l.* 11*s.* 11*d.* was then remaining in the hands of the Appellant on the balance of his account of the testator's personal estate not specifically bequeathed; that other part of the testator's personal estate consisted of the sum of 2,000*l.* received by the Respondent; of sundry arrears of rent due from the testator's estate in the county of Somerset at the time of his decease, which were received by the Respondent by virtue of a power of attorney from the Appellant; of 3,000*l.* exchequer bills; also of 10,000*l.* three *per cent.* consolidated annuities, appropriated to answer the several annuities given by the will and codicil, and confirmed by the Respondent's deed of the 4th day of March, 1822; of sundry jewels, a carriage and horses, and harness, which were possessed by the Respondent upon the decease of the testator; and of the principal sums of 12,000*l.*, 3,000*l.*, 740*l.*, 9,000*l.*, and 11,000*l.*, due on mortgage at the testator's decease, and paid by the Appellant out of the personal estate, together with interest thereon from the day of the decease of the testator

The Master further reported that the debts due from the testator proved before him, were of the

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nature of simple contract debts, and amounted in the whole to the sum of 568*l.* 11*s.* 8*d.* and that no other debts of the testator remained due and unsatisfied; and that he had proceeded to enquire whether there were any and what claims affecting the testator's personal estate in the hands of the Appellant, in respect of any leases granted by the testator not in conformity with his power of leasing; that the Respondent had been examined upon interrogatories, and there were not, as he knew or believed, any claims affecting the personal estate in the hands of the Appellant, in respect of any leases, executed by the testator not in conformity with his power of leasing.

The Master further reported, that a state of facts and charge had also been laid before him on behalf of the Appellant, thereby stating that by indentures of lease and release, dated the 17th and 18th January, 1791, the release made between the testator of the first part, the Respondent, then John Percival, Esquire, commonly called Lord Viscount Percival, of the second part; Samuel Vines, therein described, of the third part, and John Vernon, the elder, therein also described, of the fourth part; the testator and the Respondent duly conveyed all the honors, manors, lands, tenements, and hereditaments therein mentioned and described, in the county of Cork, in Ireland, unto and to the use of the said John Vernon, his heirs and assigns, in order to make him tenant to the precipe, that common recoveries might be suffered thereof, which recoveries were thereby declared to enure to the use of the testator for life, without impeachment of waste, with remainder to and for such uses, trusts, intents, and purposes, as the testator and the Respondent, John, Earl of Egmont, during their joint lives, should ap-

point; and in default thereof, and in case any appointment should be made of only part of the premises, or of only part of the whole estate and interest therein, then as concerning the premises which should remain unappointed and undisposed of, or concerning which no complete appointment should be made, and when the estates thereby appointed should respectively determine to such uses as the Respondent, in case he should survive the testator, should appoint; and in default of such appointment, and in case any such should be made of only part of the premises, or of only part of the whole estate and interest therein, then as concerning the premises which should remain unappointed or undisposed of, or concerning which no complete appointment should be made, and when the estates thereby appointed should determine to the use of the Respondent during his life, without impeachment of waste, with remainder to the use of the said John Vernon and Samuel Vines and their heirs, to preserve contingent remainders with remainder to the use of the first son of the body of the Respondent, lawfully to be begotten in tail male, with divers remainders over; and it was thereby declared that it should be lawful for the testator from time to time during his life, and after his decease for the Respondent during his life, to demise any part of the premises to any person or persons for any term or number of years not exceeding twenty-one years in possession and not in reversion, and so as there should be reserved on every demise the best and most improved yearly rent to be incident to the immediate reversion that could be reasonably had or gotten for the same, without taking any fine premium or foregift, and so as there should be therein contained conditions of re-entry for non-payment of the rents; and so as the

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same were so framed as there be not therein contained any clause whereby any power should be given to the lessee to commit waste, or whereby any lessee should be exempted from punishment for committing waste, and so as the lessees executed counterparts of their respective leases : and further stating that by indentures of lease and release, dated respectively 21st and 22d January, 1791, the release made between the testator of the 1st part, the Respondent of the 2d, the said Samuel Vines of the 3d part, and the said John Vernon the elder of the 4th part; the testator and the said Respondent conveyed certain estates therein mentioned and described, situated in the county of Somerset, unto and to the use of the said John Vernon, his heirs and assigns, in order to make him tenant to the precipe, that common recoveries might be suffered thereof, which recoveries were thereby declared to enure to the same uses, intents, and purposes as were declared by the indenture of release of the 18th January, 1791, concerning the estates therein comprised, with the like powers for the testator during his life, and after his decease for the Respondent during his life, to demise any part of the said premises, except the castle or capital messuage of Enmore, and the gardens, demesne lands, and appurtenances therewith held and enjoyed, for any term or number of years not exceeding 21 years in possession and not in reversion, in like manner as was provided in and by the indenture of the 18th January, 1791, as to the estates therein comprised.

. And the Master further reported, that by such state of facts it appeared that recoveries were duly suffered pursuant to the covenants contained in the two several indentures of release; and that the testator continued during his life in possession of the hereditaments and premises by virtue of the limitations

contained in the said indentures, and the recoveries suffered in pursuance thereof, and that the said estates were of the annual value of 14,000*l.*; and that the testator, while he was in possession thereof, alone executed many leases of the same estates, or the greater part thereof, upon the terms mentioned in such leases, and that they contained covenants on the part of the testator for quiet possession; and that the said leases, or most of them, were not in conformity with the testator's powers of leasing, inasmuch as they were for longer terms, and conferred greater powers on the lessees than the testator by the said powers was authorized to grant; and that some of the tenants paid fines for the granting of their leases, and that others had laid out considerable sums of money in improving the estates so demised to them; and that the Respondent was in the possession of the estates by virtue of the limitations aforesaid, and that the Respondent, having a son who might upon the Respondent's decease become entitled to the said estates under the aforesaid limitations, the Appellant charged that so many of the leases granted by the testator as were not in conformity with his powers of leasing, might be avoided, and the lessees might, upon eviction under such leases, have claims against the personal estate of the testator upon his covenants for quiet possession.

The state of facts and charge being admitted by the Respondent, the Master allowed the same, and found that as to such leases as had been granted by the testator not in conformity with his power of leasing, the lessees upon their eviction might have such claims affecting the testator's personal estate in the hands of the Appellant in respect of such leases; and the Master found, that subject to the payment of the testator's debts proved before

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him, and also subject to any claims which might affect the testator's personal estate in respect of any leases executed by him not in conformity with his power of leasing, the clear residue of the same consisted of the sum of 585*l.* 11*s.* 11*d.* in the hands of the Appellant; of the sum of 10,000*l.* Bank 3 *per cent.* annuities, standing in the name of the Appellant, set apart to answer the payment of the several annuities aforesaid; of 3,000*l.* exchequer bills; of 1,000*l.* cash advanced to the Respondent by the Appellant out of the testator's personal estate; of the sum of 2,000*l.* received and possessed by the Respondent as aforesaid; of the arrears of rent due at the testator's decease and possessed by the Respondent; of the jewels and other articles mentioned to have been possessed by the Respondent; and also the several mortgage sums mentioned to have been paid out of the testator's personal estate.

On the 29th July, 1824, the cause came on to be heard before the Right Honorable the Master of the Rolls for further directions upon the Master's report.


It was contended on the part of the Appellant, that before the residue of the testator's personal estate was ordered to be paid to the Respondent the Earl of Egmont, or his assigns, the Earl of Egmont should either confirm the leases granted by the testator, not in conformity with his power, or otherwise that he should give a satisfactory indemnity to the Appellant against any claims which might be made against him as the personal representative of the late Earl, in respect of the said leases, and all costs, charges, damages and expenses which the Appellant might incur or be subjected to in respect thereof.

On the part of the Respondent it was contended, that he was not bound either to confirm the leases or give an indemnity.

The Court ordered that it should be referred to the Master to tax all parties their costs of the suit as between solicitor and client, and that it should be referred back to the Master to carry on the account of the testator's personal estate from the foot of his report come to the hands of the Appellant, or to the hands of any person by his order or for his use; and that the Master should take an account of the amount and value of testator's personal estate possessed and received by the Respondent as in the Master's report mentioned; and it was ordered that the following exchequer bills, (that is to say,) Nos. 2963, 2964, and 2965, dated the 14th day of June, 1824, for 1,000*l.* each, part of the testator's personal estate in the hands of the Appellant, should be deposited in the Bank by the Appellant with the privity of the Accountant General of the Court in trust in the cause; and it was ordered that the same when so deposited should be sold with the privity of the Accountant General, and for that purpose the exchequer bills were to be delivered out to one of the cashiers of the bank, who was to receive the money to arise by such sale, and upon receipt thereof was to pay the same into the bank with the privity of the Accountant General, to be there placed to the credit of this cause, and out of the money to arise by sale of the exchequer bills when paid into the bank. It was ordered that such costs when taxed should be paid to the solicitors for the respective parties; and it was ordered that the several sums by the Master's report, dated the 26th day of February, 1824, reported to be due to the several creditors therein named should be paid to such creditors respectively, or to the legal personal representatives of such of them as might be dead; and it was referred to the Master to take an account of what

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was due from the Respondent the Earl of Egmont, to the Respondents Archibald Morton and Archibald Rodick for principal and interest upon the security for the assignment of the 19th day of April, 1822; and it was ordered, that the residue of the monies to arise by sale of the exchequer bills, after payment of the debts and costs, should be applied as follows, (that is to say) so much thereof as the Master should find to be due to Archibald Morton and Archibald Rodick, upon the security from the Respondent, should be paid to them, and the residue thereof should be paid to the Respondent, John, Earl of Egmont; and it was ordered, that the 10,000*l.* 3 *per cent.* consolidated bank annuities, reported to be standing in the name of the Appellant, should be transferred by the Appellant into the name and with the privity of the Accountant General, in trust in the said cause, to an account to be entitled, " the annuity account;" and out of the dividends to accrue thereon from time to time, it was ordered that the several annuities should be paid in manner therein mentioned; and upon the death of the annuitants respectively, any person or persons were to be at liberty to apply to the Court concerning the bank annuities as they should be advised, and the Master was to be at liberty to make a separate report or separate reports of any of the matters thereby referred to him as he should think proper, and any of the parties were to be at liberty to apply to the Court as they should be advised.

This order was inrolled.

Against so much of this order as directs that the residue of the money to arise by sale of the exchequer bills after payment of the debts and costs should be applied in manner directed by the decree (that is to say), that so much thereof as the Master should find to be due to

Archibald Morton and Archibald Rodick, from the Respondent the Earl of Egmont, on their security, should be paid to them, and that the residue thereof should be paid to the Respondent, without making a provision for the protection of the Appellant against the claims of the lessees under leases granted by the testator, the Appellant presented a petition of appeal.

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For the Appellant, *Mr. Shadwell* and *Mr. Pemberton*.

The judgment in this case rested upon the ground that this was a contingent covenant. But in *Simmonds v. Bolland*\* the covenants were various, and the indemnity was given accordingly; so in *Hawkins v. Day*,† it was doubtful whether the executor would ever become liable upon breach of the covenant which depended upon a contingency. *Eeles v. Lambert*,‡ and *Nector and Sharp v. Gennet*,|| were cases at law in which it was decided that a court of law should not interfere on the ground of outstanding covenants unbroken, to prohibit proceedings in the Ecclesiastical Court to recover a legacy. But the jurisdiction of equity was at that time, and even as late as the time of the Commonwealth unsettled.

Arg. 30 March.

It was then an unsettled question whether an action might not be maintained for a legacy—*Deeks v. Strutt*.§ If such were the law, at present, the ground of the judgment might be more solid. In those early times a legatee was compelled to give bond to the executor, on payment of the legacy to refund, in case

\* 3 Mer. 547.

|| Cro. Eliz. 466.

† Amb. 160.

§ See 5 T. R. 690—the

‡ Aleyn, 38. Styles, 37, 54, 73. judgment of Lord Kenyon.

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any debts should appear to be unsatisfied—*Chamberlain v. Chamberlain*.\* That practice has been discontinued, because the law does not order the payment of legacies until the debts are ascertained. Where a debt from its nature cannot be ascertained, not being an existing liquidated demand, but one which may become a charge upon the estate, the principle of the ancient practice gives to the executor a right to indemnity. What defence would the executor have in a court of law upon action for damages in consequence of a breach of covenant? Could a Court of Equity protect the executor in such a case. Executors are protected in equity, and creditors excluded, because they have notice under the decree and the opportunity of receiving their debts, which if they neglect they are restrained by injunction if they proceed at law. But in this case, as there is no existing debt, there can be no notice, and therefore no injunction.

The executor has notice of the covenant, and that in effect it is broken—because his testator covenanted to secure that which it was not in his power to secure. The Respondent who makes the demand against the Appellant, as executor, may himself bring the charge upon the Appellant by ejecting the tenants. Could the tenants have any remedy in equity against the residuary legatee? Or ought the executor to be put to file a bill against the legatee to refund. In the case of the *Queensberry Leases*,† a large amount of assets was retained in court to answer the demands of lessees under similar circumstances.

Suppose the residuary legatee had also been exe-

\* 1 Ch. Ca. 257.

† *Thomas v. Montgomery*, in Chanc.

cutor, could he say that he held the money not as executor, but as residuary legatee. The peculiarity of this case is, that as soon as the order issues to pay the money, the Respondent may bring ejectments against the tenants. If this be law, a tenant for life may grant leases exceeding the power at small rents, and upon large fines—the executor upon his death may hand over the assets to the younger children of the tenant for life, according to his will, and the tenants are left without remedy. It is asked whether an estate is to be kept for ever in chancery to abide a contingency. But here is a covenant ascertained to be incapable of being performed. We ask only for indemnity to be settled by the Master—an equity on behalf of creditors against volunteers.

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For the Respondents, *Mr. Horne* and *Mr. Roupell*.

It is a startling proposition that estates are to be locked up for an indefinite time. The estates of deceased persons are generally subject to contingencies. Here is no creditor making a claim against the assets. The bill claims a residue, all questions of demand against the estate having been satisfied. The fund, it is stated, is subject to a contingent demand, and they ask for indemnity. The executor is always protected by a Court of Equity. In *Nector* and *Sharp v. Gennet*, a prohibition was refused, and the Ecclesiastical Court decreed the legacy, notwithstanding the existence of a bond, on the ground that the bond was contingent. It is said that the bond given by legatees to the Ecclesiastical Court, is a protection to the executor. But here the Appellant asks something more than a bond. As to *Eeles v. Lambert*, no judgment is to be found in either of the reports. In former times the Court of

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Chancery required security from the legatees, but since the modern practice of inquiry as to debts has been introduced, the court has ceased to require such security.*

The legacies may be recalled, if prior claims upon the assets should arise.† In *Noel v. Robinson*, it is said that “common justice requires the legatee to refund.” The court now, never requires security. Suppose a creditor refuses to come in, does the court retain the fund? No; it distributes and gives to the executors equitable indemnity by injunction, as contradistinguished from legal defence. The case of *Simmonds v. Bolland*, is not precisely similar to this. There the executor was also a trustee, and there had been notice of a breach of covenant. The indemnity they seek must be by real, not personal security; and the practice would be attended with general inconvenience.

The Lord Chancellor.—Lord Egmont has the power to dispute, or to confirm the leases: may he not be required before he receives the assets to confirm the leases? If a creditor, having a present debt, omits to claim it under the decree, he may be excluded. But this is the case of creditors who are not qualified to claim—even upon ejectment, not till after judgment. The case is of the utmost importance. A residuary legatee, having the power to disturb leases made by the testator, should confirm, or undertake not to disturb them before he takes the assets. Some security is necessary notwithstanding all the inconvenience attending that course of proceeding.

Mr. Horne.—I only argue against indemnity. Lord Egmont is willing to consent that it should be

* Anon. 1 Atk. 5.

† Anon. 1 P. W. 405.

put on record, that he will not disturb the leases. As to the case of the Queensberry leases—the claims had been actually made, and the money was in court.

The Lord Chancellor.—There being in that case so many claims by tenants, the court thought it right to retain the fund, while the numerous knotty points of Scotch law were investigated.

The bill, in this case, prays either indemnity or undertaking; and as the Plaintiff is willing to give the latter, does not this make an end of the cause? But this is not done till the parties come to the bar. It is not offered by the answer. There should be no costs on either side.

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Upon this offer made by the Respondent's counsel, the case stood over that the Appellant, with the advice of his counsel, might consider whether he should accept the Respondent's undertaking. But it was afterwards ascertained, that the Respondent having assigned his interest and estate in the land, had deprived himself of the power of confirming the leases: whereupon the cause was again brought on for argument:—

The Lord Chancellor said—that if it were necessary to decide the general principle, although he was inclined to think that the Appellant had a title, he should take much time for consideration: but that the case was special, as the Respondent had the power to confirm, or to disturb the leases, and that he ought not to take the fund out of the hands of the executor, without giving indemnity against any action which might be brought by the tenants, in case of eviction, on which special ground he should advise the House to reverse the decree.

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The Earl of Eldon.—In this case, which has stood over for judgment, the residue of personal estate is demanded by the Respondent, who has the power to rescind the leases granted by the testator; and if he should do so, the Appellant, as executor of the lessor, will be liable in damages to the extent of assets received by him. Under these circumstances, the judgment, which, in substance, I propose, is, that the Appellant, upon having indemnity from the Respondent against the disturbance of the leases, should pay over the residue of the personalty.

9 June, 1827. The Lords declare, that before the residue of the testator's personal estate shall be paid to the Respondent, the Earl of Egmont, or his assigns, the said Earl of Egmont ought either to confirm, or in case he is unable to confirm by his own act, to procure to be confirmed, the said Leases granted by the said testator, not in conformity with his powers, or otherwise give a satisfactory indemnity to the Appellant, against any claims which might be made against him, in respect of the said leases, and all costs, charges, damages, and expenses, which the Appellant might incur, or be subjected to in respect thereof: And it is further ordered, that the cause be remitted back to the Court of Chancery, to proceed therein, as shall be just and in conformity with this declaration.

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IRELAND.

(COURT OF CHANCERY.)

HENRY CROKER, and others - - *Appellants.*
RICHARD MARTIN, and others - - *Respondents.*

H. R., being possessed of a leasehold estate, by a gratuitous deed in 1731, limited the term to himself for life, with remainder to his son R. R., *quasi* in tail.

In 1739, upon the marriage of R. R., then an infant, a deed, to which he was a party, was executed, whereby the term, the subject of the former settlement, was limited in trust to provide annuities to R. R. and his wife, till 1742; and until that time, and subject thereto, to permit H. R. to receive the rents, and then to raise 1,200*l.* for the use of H. R.; and from 1742, to permit R. R. to receive the rents, subject to the charges, and after the deaths of H. R., R. R., and H. R., in trust for the sons of the marriage, as R. R. should appoint, &c. with divers limitations over in trust to raise portions, &c.; and in case there should be no sons of the marriage, or by any future wife, &c. that the term should revert to H. R., his executors, &c.; and H. R. by the deed covenanted to provide for R. R., his wife, and children, board and lodging until 1742, and at that time to pay R. R., his executors, &c., 300*l.* in money or stock, &c.

This deed was executed and acted upon by all the parties.

R. R. came of age in 1741, and died without issue male.

In 1743, H. R. made an appointment under a power in the deed of 1731. By his will also reciting and executing a power in the deed of 1731, and without noticing the limitation of the deed of 1739, he gave to his daughters A. and B., under whom the Appellants claimed the residue of his personal estate.

Held in the Court below, and on appeal that the term did not pass as part of the residue, but vested in R. R. by operation of the deed of 1731, or by operation of the deed of 1739, vested in H. R., subject to the trusts of the deed of 1731, in favour of R. R.

Held also that it was not a case of election, as R. R. had no power to reject the whole of the deed of 1739.

BY a deed dated the 19th of May, 1731, and made between Hodder Roberts, of the one part, and John

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Watkins, Michael Roberts, and the Reverend Randall Roberts, of the other part, after reciting that Hodder Roberts had received as a marriage portion with his wife Jane, lately deceased, 800*l.*, and that he had eight children, and was desirous to make a provision for each of them, by conveying the lands thereafter mentioned to the several uses, trusts, and purposes, and subject to the several powers thereafter contained, it was witnessed, that out of his fatherly affection for his said children, and in consideration of the said sum of 800*l.*, he gave, granted, &c., unto the said John Watkins, &c., all the lands of Bridgetown, Grange, Clonmore, and various other leasehold estates therein described, to hold, &c., to the several uses, &c.: that is to say, as to Bridgetown and Clonmore upon trust, to permit Hodder Roberts to hold the said lands, and receive the rents and profits thereof during his life; and after the decease of Hodder Roberts, to stand possessed of the said lands to the use of Randall Roberts, eldest son of Hodder Roberts, his executors, administrators, and assigns, subject to the entire yearly rent payable out of the said lands, together with the lands of Grange, unto Francis Hodder, with remainder to Watkins, second son of Hodder Roberts, and several limitations over, if Randall Roberts should die without issue male of his body before he should attain the age of twenty-one years, and also subject to a power for Hodder Roberts, by any deed or writing, or by his will, to be attested by two or more witnesses, to charge the said lands with any sum of money not exceeding in the whole the sum of 2,000*l.* sterling, to be raised out of the rents, &c., or by mortgage, &c., and to be paid to his daughters by Jane Roberts, at such times and in such proportions, and with such interest as he should direct and appoint, &c.; and it was also provided, that it should

be lawful for him to make leases of all or any part of the said lands for any term whatsoever, so as two-thirds of the most improved yearly rent should be reserved.

This deed was registered on the 23d of November, 1736.

By an indenture, dated the 29th of December, 1739, and made between Hodder Roberts of the first part; Randall Roberts, the eldest son of Hodder Roberts, of the second part; John Watkins and Matthias Smith, of the third part; Catherine Kift, widow, of the fourth part; and Mary Kift, spinster, daughter of Catherine Kift, of the fifth part; after reciting that Francis Hodder, by indenture of lease, bearing date the 1st of May, 1724, demised unto Hodder Roberts, the town and lands of Bridgetown and Grange, to hold, &c., for the term of 982 years and a half, at the rent of 200*l.*: And also, that a marriage was intended to be shortly thereafter solemnized between Randall Roberts and Mary Kift; It was witnessed, that Hodder Roberts, in consideration of the marriage, and for the preferment of his son, and in consideration of the sum of 1,000*l.*, the marriage portion of Mary Kift, which she was entitled to by the will of her father, which sum was to be paid to Hodder Roberts, and for settling and securing a jointure of 100*l.* *per annum* unto Mary Kift, during her life, in case she should survive Randall Roberts, and for making some provision of maintenance for Randall and Mary, and the issue of the marriage, Hodder Roberts granted, &c., to John Watkins and Matthias Smith, their executors and administrators, those parts of the lands of Bridgetown, which were thereafter described, amounting to 798 acres, to hold, &c., for all the remainder of the term of 982 years, then unexpired of the lease, at the yearly

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rent of 200*l.* sterling, payable to the heirs and assigns of Francis Hodder ; and it was thereby declared, that the said lands were granted upon trust for Hodder Roberts, &c., until the marriage, and after the solemnization thereof, to the intent that Randall Roberts, and his assigns, should yearly receive out of the said lands an annuity of 100*l.* until the 1st of May, 1742; and upon trust to permit Hodder Roberts, and his assigns, to receive the rents of the said lands, subject to the annuity of 100*l.* to Randall Roberts, and also subject to the like annuity of 100*l.* to Mary Kift, in case Randall Roberts should die before the 1st of May, 1742 : And upon further trust, that the trustees should, out of the profits of the said lands by sale or mortgage, or otherwise, raise 1,200*l.* for the use of Hodder Roberts, his executors, &c., and to be paid on the 1st of May, 1744, with interest, &c. ; and upon further trust, from the 1st of May, 1742, to permit Randall Roberts and his assigns, to receive the rents of the said lands, charged as aforesaid : And upon further trust, that after the death of Randall Roberts and Hodder Roberts, the trustees should, subject to the said several charges and payments, permit such of the son or sons of Randall Roberts on the body of Mary his intended wife to be begotten, to hold the said lands, in such manner and form as Randall Roberts should direct and appoint ; and for want of such direction and appointment, then that the lands should go to such son or sons equally, with divers limitations over in case there should be no sons in trust, to raise portions for daughters of the marriage, and to sons of any future marriage of Randall Roberts, according to his appointment, and in default, &c., for raising portions for the daughters of any such future marriage ; and upon further trust, that immediately

after the said portions should be raised, or if there should happen to be no such daughter by any such after taken wife, then that the said thereby granted lands and premises should, for and during the residue and remainder of the said term, revert to Hodder Roberts, his executors, administrators, and assigns; and upon farther trust, that in case Randall Roberts should die without any son or sons, or issue male by Mary Kift, or any after taken wife, and should leave one or more daughter or daughters, the trustees should raise 1,500*l.* for the portion or portions of such daughter or daughters, with interest at five pounds *per cent.*; and Hodder Roberts covenanted to provide Randall Roberts, and his wife and their children, board and lodging; and on the 1st day of May, 1742, to pay to Randall Roberts, his executors, administrators, or assigns, 300*l.* sterling, or in lieu thereof to deliver cattle of that value, and also as many cattle as should be sufficient to stock certain lands then in the possession of Hodder Roberts.

This deed was registered on the 28th of January, 1740, and the marriage between Randall Roberts and Mary Kift having been shortly after solemnized, they lived with Hodder Roberts, according to the provisions of the deed, till 1742; Randall Roberts receiving the annuity of 100*l.* during that period. He attained his age of twenty-one on the 20th of February, 1741. On the 1st of May, 1742, Randall Roberts took possession of the lands, and received from Hodder Roberts 300*l.* in cash, and stock according to the provisions of the deed of 1739, and signed a receipt to that effect, which was indorsed on the deed. By a deed dated the 8th of June, 1743, to which Randall Roberts was a party, Martha and Elizabeth, the sisters of Randall Roberts, having, under the grant of

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their father, a charge upon the lands comprised in the settlement of 1739, released their claims and confirmed the deed of settlement. Randall Roberts also entered into divers agreements for granting leases of the lands comprised in the settlement of 1739, and upon bills filed to compel the execution of those leases respectively, in his answers recognised the deed of 1739.

Upon a marriage between William Freeman and Elizabeth, daughter of Hodder Roberts, by indenture, dated the 14th of October, 1743, Hodder Roberts demised the lands of Clonmore, and the other lands of Bridgetown not included in the settlement of 1739, to Mr. Freeman, for the term of 960 years, at the yearly rent of 88*l.*; being, according to the power reserved to him by the settlement of 1731, more than two thirds of the real value of the premises.

By a deed dated the 15th of October, 1743, after reciting among other things the settlement of the 19th of May, 1731, and the power thereby reserved to Hodder Roberts to charge the lands of Clonmore, and the other lands of Bridgetown, with any sum of money not exceeding in the whole the sum of 2,000*l.*; and that Hodder Roberts, on the marriage of Randall Roberts, by indenture, bearing date the 29th of December, 1739, conveyed to John Watkins and Matthias Smith, as trustees therein mentioned, 798 acres of the lands of Bridgetown, and excepted out of such conveyance all the residue of the lands of Bridgetown, to the intent that Hodder Roberts might charge the residue of the said lands with such part of the sum of 2,000*l.* as he should think proper, as a provision for his daughters; and reciting that on the marriage of his daughter Elizabeth with William Freeman, he agreed to give as a marriage portion with his said

daughter the sum of 600*l.* sterling, and that the same should be charged on the said lands ; it was witnessed, that in consideration of the marriage, and in execution of the agreement, and by virtue of the power so reserved to him, Hodder Roberts granted, &c. the lands demised, as aforesaid, to William Freeman, to trustees, subject to redemption upon payment of the sum of 600*l.* by Hodder Roberts, &c.

A deed similar in effect was executed on the marriage of Martha, another daughter of Hodder Roberts, with William Verling.

By a deed dated the 6th of June, 1743, Hodder Roberts conveyed to his son Watkins his own life-interest in the premises to which Watkins was entitled in remainder under the settlement of 1731, and procured the concurrence of the surviving trustees in the deed of the 19th of May, 1731.

In the year 1747 Hodder Roberts died.

By his will, dated the 4th of March, 1747, he recited and executed the power reserved to him by the deed of 19th of May, 1731, of charging 800*l.* upon certain lands therein mentioned, and he specifically bequeathed the lands of Clonmore and Paul, otherwise Coolrahaderig, (being the lands of Bridgetown excepted out of or not included in the settlement of 1739,) to his two daughters, Arabella and Harriet, subject to the mortgage for 600*l.*, and he bequeathed to his wife Catharine all his household goods, linen, and plate, then in the city of Cork, and the residue of his personal fortune, to his said two daughters, equally to be divided between them.

In December, 1748, Randall Roberts filed a bill to set aside the deed of 1743, claiming the lands of Clonmore and Paul as part of the lands settled on him by the deed of the 19th of May, 1731. Answers to

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this bill were put in, and witnesses were examined, but what was finally done in the cause did not appear.

In May, 1754, the trustees of the settlement of the 29th of December, 1739, mortgaged the lands comprised therein, to Richard Bradshaw, for 1,200*l.*, in which mortgage Randall Roberts joined, and the mortgage money was applied in payment of 1,200*l.* remaining due upon an old mortgage affecting those lands in common with other lands of Hodder Roberts. The 1,200*l.* in the above deed mentioned, was the residue then remaining due of a sum of 2,100*l.*, for which the lands of Bridgetown, together with other lands, had been mortgaged by deed, bearing date the 21st of August, 1716, by Randall Roberts, the father of Hodder Roberts, to one Ralph Westrop, whose representatives received the 1,200*l.*

Randall Roberts having a daughter, named Catherine, an only child, a marriage took place between her and the Respondent Richard Martin, in the year 1773, previous to which articles were entered into, dated the 2d of January, 1773, by which Randall Roberts granted to trustees an annuity of 300*l.* a year for five years, commencing the 1st of May, 1776, to be issuing out of certain parts of the lands of Bridgetown, and another of 300*l.* a year for five years, commencing the 1st of May, 1784, out of the same lands, as the portion of the said Catherine, with clauses of distress and entry.

In the year 1777 Randall Roberts having neglected to pay the annuity and the head rent of 200*l.*, and the landlord having threatened an ejectment, the Respondent Richard Martin, (after paying 300*l.* head-rent, to prevent the ejectment,) filed his bill in the Court of Chancery, in Ireland, in which he obtained a decree for an account of what was due to him, and

ultimately a final decree for payment of the amount, together with his costs.

By deed dated the 29th of September, 1786, Randall Roberts assigned to the Respondent Richard Martin, a part of the lands of Bridgetown, called the West Inches, for a term of four hundred years, at 129*l.* rent, in satisfaction of 2,193*l.*, part of the money reported due to the Respondent.

By indenture bearing date the 25th of October, 1788, after reciting that 1,651*l.* 4*s.* 8*d.* would be due to the Respondent Richard Martin, on the 1st of May, then next, in consideration of the same being remitted, and of 360*l.* then paid by Richard Martin, &c. Randall Roberts assigned all the town and lands of Bridgetown, not already sold, to the Respondent Martin, to trustees, to the use of himself for life, with remainder, subject to some small charges, to the Respondent Richard Martin for life, with remainder to Catherine his wife, for life, and after her death, to their only child, Mary Martin, her executors, administrators, and assigns.

In the year 1795 Mary Martin intermarried with John Southcote Mansergh; previous to which articles were executed, dated 6th of January, 1795, whereby the Respondent Richard Martin and Catherine his wife assigned the lands of Bridgetown to trustees, discharged from their life interest, and the Respondent Richard Martin also gave up 100*l.* 14*s.* 3*d.* a year of the rent of West Inches, to the use of John Southcote Mansergh and Mary his wife, and the issue of the marriage, and in consideration of that settlement lands were at the same time conveyed by John Southcote Mansergh and his father to the same uses.

On the 15th of June, 1795, Randall Roberts died;

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whereupon John Southcote Mansergh and Mary his wife entered into possession of the lands of Bridgetown.

In Hilary term, 1796, John and Mary Mansergh, then lately before come of age, levied a fine of the lands of Bridgetown, to the use of the articles of the 6th of January, 1795.

In February, 1796, the Appellants, Henry Croker and Harriet Jane his wife, and Watkins William Verling, filed their original bill in this cause, in the Court of Chancery, in Ireland, which was afterwards amended, whereby they claimed all the lands comprised in the settlement of the 29th of December, 1739, as having passed under the residuary clause contained in the will of Hodder Roberts, to his daughters Arabella and Harriet Roberts, under whom the Appellants set up a title.

To this bill the Respondents put in their answers in the month of December, 1796, but no proceedings were taken by the Appellants in the cause (except amending their bill in the year 1797,) until the year 1805.

In 1805 the Appellants moved for a receiver, but their motion was refused, with costs.

The progress of the cause having been delayed by various abatements, in February, 1816, the Appellants brought their cause to a hearing. The Appellants contended that Randall Roberts, under the deed of 1739, took a more beneficial interest than under the settlement of 1731, and that he had accepted the latter provision after he came of age, in lieu of the former; and in support of that allegation, they insisted upon several answers put in by Randall Roberts to bills filed against him, one of them by Wrottesley de la Rue, another by one John Mannsell, and another by

Alice Widenham, whereby he set up the strict limitations and leasing powers comprised in the deed of 29th of December, 1739, in bar of executing certain leases which were claimed from him by the Plaintiffs in those suits.

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After a full argument which lasted for several days, the Lord Chancellor of Ireland dismissed the Appellants' bill without costs.

The appeal was presented against this decree by parties claiming under Arabella and Harriet, the daughters of Hodder Roberts.*

For the Appellants—*Mr. Shadwell* and *Mr. Phillimore*.

For the Respondents.—*Mr. Horne* and *Mr. Sugden*.

For the Appellants it was argued, that although by the voluntary settlement of 1731, Randall Roberts was entitled on arriving at the age of twenty-one, to the absolute interest in these lands, subject to his father's life estate, yet having by the deed of 1739 entered into a new arrangement, whereby his father gave up his life estate and other considerable benefits to Randall Roberts, and the ultimate reversion had been by that deed expressly limited to Hodder Roberts, the father, his executors, administrators, and assigns, Hodder Roberts thereby became a purchaser

Arg.
11th June.

* After the decree and before presenting the appeal, John Southcote Mansergh died, having made his will in March, 1817; whereby, in pursuance of the powers vested in him by his marriage settlement, he appointed the lands of Bridgetown as a provision for his second son, the Respondent, Charles Carden Mansergh, an infant, subject to a charge of 1,020*l.* with which he encumbered the same for his two daughters, the Respondents, Catherine (since become the wife of George Walker,) and Mary Martin Mansergh, an infant.

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for full and valuable consideration of that reversion ; and Randall Roberts having, when he came of age, taken all the benefit provided for him by that deed, and so frequently and deliberately recognised and confirmed it, it was not in his power to resort to any title under the deed of 1731, and any attempt to do so was a manifest fraud on Hodder Roberts and those who claimed title under his will to this reversion, as limited to him by the deed of 1739 : that it was incumbent on Randall Roberts, on attaining his age of twenty-one years, to elect between the settlement of 1739 and the voluntary deed of 1731, and either to ratify the settlement of 1739, or to abandon it and the benefit he was enjoying under it ; and that he so did, or must in equity have been presumed so to have done, because he took possession of his father's life estate, and received the sum of 300*l.*, neither of which he would have been entitled to if he had insisted on a title under the deed of 1731, in opposition to that of 1739 ; and therefore the Appellants insisted that Randall Roberts and all persons deriving title under him with notice, are bound to give full effect to that deed in all its parts, and consequently to the ultimate limitation to Hodder Roberts, his executors, administrators and assigns, under which the Appellants derive their title.

For the Respondent.

The deed of 1739, though competent to supersede that of 1731, so far as the considerations of the portion and marriage extend, is, as to the ultimate limitation to Hodder and his representatives, a voluntary deed, posterior in time and operation to that of 1731 ; it is as if Hodder had then mortgaged the estate for a sum of money, and that by the terms of the deed the equity of redemption had been limited to him. The ultimate limitation in the deed of 1739, on default of male issue

of Randall Roberts, is merely that the premises should go and revert back to Hodder Roberts, his executors, administrators, and assigns; words which import not any new provision or stipulation for his benefit, but simply a declaration that in that event (all that was then contracted for being done and satisfied,) the premises should stand as if the deed of 1739 had never been executed, whereby, according to the strict terms used, they must vest in Randall Roberts, he having been, under the deed of 1731, the assignee of his father. It would be strange to give any other construction to such a clause in the deed of 1739, in which the only party interested under the deed of 1731, was a minor, and could not contract, in which the deed of 1731 is not recited, and in which the family of the wife, the only parties contracting with Hodder Roberts, had no estate in the premises in question, nor power of giving the ultimate right to him, and in which the words used shew that they intended only to leave that right untouched, and as they found it. That this was the understanding of the parties appears from the several acts above referred to, and particularly from the recitals in the deed of 1743, and the terms of Hodder's will, which, if they are in law sufficient to convey this reversion, are such as to shew that it was not in his contemplation.


If the import of the deed of 1739 was, that the ultimate remainder should vest in Hodder Roberts, that deed could have no such effect, the only party thereto who was competent to convey such remainder being a minor, incapable by law of doing so; nor were there in the deed any words of conveyance from him; and if it be said that at his full age he elected to take under that deed present maintenance, and therefore cannot contest any part of it; the an-

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swer is, that as to such maintenance he had no election, it was created by a contract between his father and the family of his wife. They had paid the fortune which purchased it; and though the husband had the power to squander or part with it, yet his father could not call on him to make an election to that effect, and consequently cannot found any right on his having omitted to do so. A wife is interested in the present maintenance of her husband, and shall not by such means be deprived of the benefit of it. It would be a fraud on her and her family if the father had required him to relinquish his present maintenance, under the coercion of facts arising out of the deed of 1731, which was known to the father at the time of the marriage, and not disclosed by him to the wife or her family.

But the answers of Randall to bills filed by tenants have been relied on. These answers alleged no election. They merely stated the deed of 1739 as it was, and submitted the effect to the Court, which decreed against him as entitled to the ultimate remainder, thereby negating the inference now sought to be drawn from those causes. It cannot be conceived that he meant to make such election then, when he had been so many years married, and had no son to take benefit from the deed of 1739, to the injury of his daughter, the first and natural object of his affection; such answers do not afford any evidence of an antecedent election, and the decrees made thereon are strong evidence to the contrary.

2d July.

The Lord Chancellor.—This case arises out of deeds executed at a very considerable distance of time. Various proceedings have been had in the Court of Chancery in Ireland, and at length the cause was heard before the Lord Chancellor of Ireland, in

the year 1816, when the bill was dismissed, but without costs. About two years afterwards, namely, in the year 1818, the Plaintiffs appealed to this House. The circumstance of there being so many parties upon the record has occasioned considerable delay, in consequence of the deaths of some of those parties during the pendency of the proceeding, and the necessity of reviving the suit.

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The case arose out of two deeds, one executed in the year 1731, and the other executed in the year 1739. A person of the name of Hodder Roberts was possessed of a very long term in certain lands in Ireland. By the deed of 1731 he settled the term upon himself for life, with remainder to his eldest son, Randall Roberts, his executors, administrators, and assigns, and in the event of Randall Roberts dying without male issue under twenty-one years of age, it was limited to Watkins Roberts, the second son, and so on. But the property being leasehold, vested absolutely in the first tenant, *quasi* in tail. This was a purely voluntary settlement.

There was afterwards, in the year 1739, another deed executed of a great part of the same property. That was executed on the occasion of a marriage being in contemplation between Randall Roberts, who was a party to the former deed, and Mary Kift. The settlement was made in consideration of that marriage and the fortune of the lady. That settlement, therefore, was made for a valuable consideration: by that settlement an estate for life was given to Randall Roberts—certain interests were given to the wife—interests were given to the male issue of Randall Roberts, if he should have any, and there was power given to raise portions for the daughters of that marriage. That marriage took effect. Randall Roberts

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however, afterwards died without leaving any male issue; portions were raised for the daughters, and there was an end of the limitations under the deed of 1739. But there was a provision in the deed, that after all the limitations should be satisfied, the estate should revert to Hodder Roberts; and the question, and the only question in the cause was, whether the estate should go back to Hodder Roberts, he taking a new estate in the property, or whether it should go back, and be held subject to the trusts of the voluntary settlement of the year 1731.

The Lord Chancellor of Ireland was of opinion that the estate, after all the limitations under the deed of 1739 were satisfied and exhausted, went back, and was held subject to the trusts of the former deed of the year 1731; and I should submit to your Lordships, that the opinion of the Lord Chancellor of Ireland in that respect is correct. The deed of 1731 was a purely voluntary settlement, binding against Hodder Roberts, but not binding against a purchaser for a valuable consideration. The deed of 1739 was granted for a valuable consideration, and to the extent therefore of the limitations under that deed in favour of Randall Roberts, and the issue of the marriage, and the parties who took as purchasers, to that extent, the deed of 1739 would prevail over the deed of 1731; but it would not prevail over the deed of 1731 any further, and therefore, when it was provided by an express stipulation in the deed of 1739, that after all the interests that had been created by the purchase, were satisfied, the estate should revert to Hodder Roberts, that estate would be held by Hodder Roberts, subject to the trusts of the voluntary settlement of 1731, which, though not binding as against a purchaser, was binding against him. I apprehend the

Lord Chancellor of Ireland, therefore, in deciding that the estate reverted to Hodder Roberts, subject to the trusts of the settlement of 1731, decided correctly and properly.

The question arose out of the will of Hodder Roberts, by which Hodder Roberts had in general terms disposed of all the residue of his personal property to persons under whom the present Plaintiffs claim. If Hodder Roberts therefore took no interest or estate by virtue of the deed of 1739, but it reverted back to him, subject to the trusts of the settlement of 1731, it would be bound by the provisions of that deed, and would not pass to the Plaintiffs under the residuary clause in the will to which I have adverted.

It is perfectly clear, independently of the construction of the deeds to which I have adverted, and the language of the deeds, that Hodder Roberts never meant that the deed of 1731 should be rescinded or altered, except to the extent of the provisions contained in the deed of 1739, with reference to Randall Roberts and the issue of his marriage, because after the deed of 1739, Hodder Roberts, over and over again, recognised the existence of the deed of 1731, and acted according to its provisions.

In the year 1743, which was four years after the execution of the deed of 1739, upon the marriage of his daughter Martha, with a person of the name of Verling, in the settlement made upon that occasion, he recited the deed of 1731, as an existing deed, referred to the powers in that deed, and executed a power conformably to the provisions of the deed of 1731; so that it appears not only that the language of the instrument supports the judgment given by the Lord Chancellor of Ireland, but that it was the obvious and manifest intention of Hodder

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Roberts, who was the party under whom the present Plaintiffs claim, that the deed of 1731 should be an operative deed, and that it should be broken in upon, only to the extent of the particular interest created by the deed of 1739. It is also a remarkable circumstance, that no mention whatever is made by Hodder Roberts in his will, (although that will is sufficiently particular,) of the supposed interest he had at that time, with respect to that property, so as to enable him to dispose of it. The language of the instrument is confirmed by the obvious intention and meaning of Hodder Roberts, and that tends to shew that the judgment pronounced by the Lord Chancellor of Ireland, was perfectly correct.

It was argued for the Plaintiffs that Randall Roberts, who took under the deed of 1731, and also under the deed of 1739, ought, after he came of age, to have made his election to take under one deed or the other; and it was argued that in fact he had made his election, but it was impossible that Randall Roberts could make his election, he was not the only party to the deed of 1739, there were other parties to that deed; he was not therefore in a condition to get rid of the obligation and renounce the provisions of the deed of 1739 altogether, and take under the deed of 1731, because the parties to the marriage settlement were interested in the preservation of the deed of 1739, and therefore it was impossible he could make such election.


But it is said that he recognised over and over again, by his own acts, the deed of 1739, long after he came of age. It is true he did recognise by his acts the provisions of that deed, because they were all binding and operative provisions: they were provisions made for a valuable consideration under his

marriage settlement, he could not get rid of those provisions; they existed in conjunction with the deed of 1731, qualifying that deed, but not extinguishing and annihilating that deed, prevailing over it only to the extent of the provisions contained in that deed; and therefore this recognition of the deed of 1739, an operative deed which he could not get rid of, is no argument to shew that he or his descendants are not entitled to come in and claim under the deed of 1731. The arguments, instead of shewing that the judgment was incorrect, fail altogether. The judgment therefore should be affirmed.

In disposing of the original bill, in the Court below, the Lord Chancellor dismissed it without costs; but as the parties have thought fit to appeal against that decision, I would propose that the judgment be affirmed, with 100*l.* costs.

Judgment affirmed, with 100*l.* costs.

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ENGLAND.

(COURT OF KING'S BENCH.)

LANCEFIELD - - - - *Plaintiff in Error.*ALLEN and others - - - *Defendants in Error.*

In a declaration by executors, a count stating that the Defendant had accounted with the Plaintiff's "executors as aforesaid," &c., was joined with counts, stating promises to the testator: Held not a misjoinder of action, or if so cured by verdict.

THE Defendants in Error brought an action against the Plaintiff in Error, for goods sold and delivered to him by one N. G., deceased, their testator. The declaration in all the counts but one, stated promises made to the testator. In the last count, the Plaintiffs declared that J. L., the Plaintiff in Error, "had accounted with them, A. and C., (the Defendants in Error) executors as aforesaid, of and concerning divers sums of money from the said J. L., to the said A. and C., executors as aforesaid, due and owing, and in arrear; and that he, J. C., upon that account, was found in arrear and indebted to the said A. and C., executors as aforesaid, in the further sum of 150*l.*, &c.

This, it was contended, was a misjoinder of action, as the declaration contained counts upon promises, alleged to have been made by the Plaintiff in Error to the testator, and also a count upon a promise alleged to have been made by the Plaintiff in Error, to the Defendants in Error, in their own right, and not as executors; and that it was

necessary that it should have been expressly alleged, that the promise was made to them *as* executors.

On the part of the Defendants in Error, it was contended, 1. That the action being brought by them, as executors, it must be presumed, with reference to the other counts of the declaration, that the last count was founded on an account stated by the Plaintiff in Error, with the Defendants in Error, as executors of N. G. ; and that the promise declared on, in that count, was made to them accordingly, as such executors. 2. That after verdict, it must be presumed that evidence was given of these facts at the trial, which would be sufficient to support the judgment, and that the objection to the last count being matter of form, is cured by the verdict.

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The judgment was affirmed, with 120*l.* costs.

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(COURT OF CHANCERY.)

DAVID DA SILVA JOCHEBED BERNAL,
 ESTHER BERNAL, and MIRYAM
 BERNAL, Executor and Executrixes } *Appellants.*
 of ISAAC BERNAL, deceased - - }

The Most Honourable GEORGE } *Respondent.*
 AUGUSTUS, Marquis of DONEGAL }

D. having filed against M. and B. a bill in Equity to cancel, for want of consideration, certain post obit bonds, and a general bond which D. had executed and delivered to B. to secure the balance of account between M. and B., and future advances by B. to M., and D. having afterwards dismissed the bill as against M., and examined him as a witness, it was decreed on appeal, reversing the judgment below, that D., having deliberately executed a deed acknowledging that the bonds were given to secure certain sums actually advanced by B. to D., and a bond in a penalty defeasible on payment of monies advanced and to be advanced by B. to M., and accounts stated and settled between B. and M., and as no account could be taken in the cause between B. and M., who was no longer a party, D. had debarred himself from impeaching the securities or the consideration stated in them: but on reference to the Master to take an account of what was due from D. to B. on the securities, although it was directed that D. should be bound by the accounts stated and settled between M. and B., he was to be at liberty to falsify the same, or shew any errors or overcharges therein.

In proceeding under this decree upon the account in the Master's office, a book of accounts was produced containing a general statement of accounts between M. and B., and a particular

entry as to an alleged purchase by M. from B., of certain bonds executed by W. This entry appeared in the midst of the general account upon two leaves, having an appearance of being inserted in the place of two which had been cut out, but which might have been brought into that state by continued use. Many of the items extending over a considerable period of time, were in the same ink and handwriting. Payments of prior date were entered after payments of subsequent date; and the account, as it appeared, laboured under other suspicious circumstances. There were also produced before the Master, by consent of all parties, plain copies, to save examined copies of the proceedings in a certain cause in which one W. was Plaintiff, and M. and B. with others Defendants; and in which cause it was found upon the decree, (the same books and account having been produced in the cause,) that no money had been advanced, or *bonâ fide* allowed by B. to M. on the bonds in question. Under these circumstances the Master disallowed the charge of B. against D., in respect of the alleged sale of W.'s bonds by B. to M., and his report to that effect was confirmed by the Court below.

Held on appeal that under the circumstances above stated, and the liberty given by the order to falsify the account, &c. the order confirming the report was right.

Where a Master, by his report, certifies a fact, and exceptions are taken to the report, it lies upon those who are to uphold the report, to produce the evidence of the fact. So if he certifies the result of an account upon the allowance or disallowance of *items* in dispute, and one of the parties excepts to the report, both as to the principle on which the account is taken, and the evidence in support of the allowance or disallowance of the *items*, the parties in whose favour the report is made, must produce the evidence on the hearing of the exceptions.

Whether upon leave "to surcharge and falsify," equities can be administered. *Quære.*

Whether such consent to admit copies of such proceeding as before mentioned, precludes the party who consents from objecting that the originals are not evidence. *Quære.* But if he permits them to be read before the Master and the Court without efficiently raising a distinct objection upon this ground, although by his exception he objects to the report generally, as not supported by evidence; *semb.* that the Master, acting upon the re-

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ference, with leave "to surcharge and falsify," may administer such equity as above mentioned, by disallowing the items which such evidence applies.

IN the month of June, 1803, the Respondent filed a bill in the Court of Chancery in Ireland, against Isaac Bernal and Edward May; impeaching certain securities executed by the Respondent when Earl of Belfast, to Bernal, such securities being four post obit bonds, payable in the event of the Respondent surviving his father, the late Marquis of Donegal; one bearing date the 8th of June, 1795, in the penal sum of 48,000*l.*, conditioned for the payment of 24,000*l.*; two others bearing date respectively the 20th of June, 1795, in the penal sums of 24,000*l.* and 1,000*l.*, conditioned for the payment of 12,000*l.* and 500*l.*; and the 4th, bearing date the 6th of July, 1795, in the penal sum of 20,000*l.*, conditioned for the payment of 10,000*l.*; and likewise a general bond (in which May was bound jointly with the Respondent,) and warrant of attorney for the penal sum of 40,000*l.* The bill stated in effect, that he Respondent had received no consideration for the post obit bonds, except certain bonds executed by one Wharton to May,* and which it was alleged virtually belonged to

* For the clear understanding of the case it is expedient to state shortly the facts of the suit between Wharton and May.

On the 7th of February, 1795, John Wharton filed a bill in the Court of Chancery in England, against Edward May, Isaac Bernal, Joshua Mendes Da Costa, and other parties, stating in substance, divers pecuniary transactions with Bernal and Da Costa, in the result of which they had obtained from Wharton divers bonds and securities, the considerations for which Wharton thereby impeached. The bill also stated transactions of a pecu-

Bernal. The bill prayed in substance, that the four post obit bonds, and the general bond and warrant of

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niary nature between Wharton and May; and that Wharton having commissioned May, by compromise or otherwise, to get back from Bernal and Da Costa the securities above mentioned, May, upon the pretence that he had paid off, or by payment got rid of such securities, obtained from Wharton post obit bonds executed by Wharton to him, for divers large sums of money, to the aggregate amount therein mentioned. The bill then went on to state, that May had not paid any money, or other valuable consideration to Bernal, for the original securities; and that May was in fact trustee for Bernal and Da Costa, of the securities executed by Wharton to May, and treated them as a substitution for the original ones given to Bernal and Da Costa. The bill prayed in substance, that all the bonds and warrants of attorney, executed by Wharton to May, might stand as securities, only for what was really due from Wharton to the Defendants, or any of them, on the balance of all accounts between them. It then prayed that such accounts might be taken, and for appropriate relief and an injunction.

To this bill May put in several answers, in which he represented himself to have given Bernal bonds and securities of value, as a consideration for Wharton's original securities; which he had, with the concurrence of Wharton, destroyed; and, claimed to be a purchaser, for valuable consideration, of the securities executed by Wharton to himself.

Bernal and Da Costa also put in answers; and Bernal, by allegations, similar to those of May, endeavoured to place May on the footing of a purchaser.

In the course of the cause, it appearing that Wharton's bonds to May had come into the hands of the Respondent, he was, by supplemental bill, made a party; and on the 25th of January, 1797, Respondent put in a short answer, in the nature of a disclaimer, stating that May had some time before, for valuable consideration, assigned, deposited, or delivered, to or for the benefit of the Respondent, certain securities executed by Wharton; but that he, Respondent, did not then hold them, or claim any interest therein.

The Respondent was debited with the amount of these securities, or a large portion of them, in account with May. The bill was dismissed as against Respondent, upon the coming in of his

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attorney for 40,000*l.*, might be given up to the Respondent to be cancelled;—that satisfaction might be

answer, and the suit proceeded without his participation. Evidence was entered into on both sides, and divers proceedings were had in the cause, which was heard on the 25th of November, 1799, and the Court declared, that the bonds given by Wharton to May, and particularly mentioned; as well as a bond and warrant of attorney given by Wharton to Da Costa; appeared to have been the result of a confederacy between Bernal, Da Costa, and May, to defraud and impose on Wharton; and to have been obtained by an abuse of confidence reposed in Da Costa and May, (who pretended to act as his agents,) with the privity and knowledge of Bernal, who shared in the unjust gains of the several transactions in the pleadings mentioned; and it was decreed, that the bonds, and the judgments entered up, should stand as a security, only for the sums which should appear really due from Wharton, on the accounts thereafter directed; and it was referred to the Master, to take an account of all dealings and transactions between Wharton and Bernal, Wharton and Da Costa, and Wharton and May.

Wharton and May appealed against this decree, which was affirmed, with some variations, one of which seems important with reference to the present appeal. The decree, among other things, having declared, that Edward May was entitled to hold the two bonds dated the 3d November, 1794, which he obtained from Wharton, in lieu of the bonds for 6,000*l.* each, payable on the death of Mrs. Anne Hall Stevenson, and Mrs. Frances Farquharson, (and with which he was entrusted by Wharton, to compound and settle with Isaac Bernal,) as a security only for such sum as was really paid or allowed in account between him and the Defendant Isaac Bernal, when the last mentioned bonds were given up. The House of Lords varied this part of the decree, by introducing the words "*bond fide*," and directed that May should hold said two bonds of 3d November, 1794, as a security only for such sum as was really paid; or "*bond fide*" allowed in account between May and Bernal, when the two last mentioned bonds were given up. Upon inquiry before the Master, consequent upon this variation, several meetings were had; and Bernal's book of accounts hereinafter mentioned, was produced; and the account in page 11, in which credit is given for 7,500*l.*, on account of the two bonds, payable on the death of Mrs. Ste-

entered on the records of the judgments which had been entered up;—and that an account might be taken of all monies received by Bernal, or for his use, by virtue of the post obit bonds—executions in the bill mentioned—or otherwise; and that Bernal might refund; the Respondent offering to give up to him the bonds of Wharton, and to pay to certain third persons, certain monies lent to the Respondent, in a degree, upon the credit of them; and the bill went on to pray all necessary accounts and an injunction to stay proceedings at law.

The injunction was granted upon motion, before answer.

In the month of January, 1804, Bernal put in his answer, wherein he detailed the transactions between himself, May, and Wharton; and stated, that in the month of July, 1794, he had delivered up to May, bonds and notes of Wharton, amounting with interest to 19,212*l.* 12*s.* 10*d.*, and afterwards, upon the persuasion of May, consented to abate 8,000*l.* in his demand against Wharton; and that May executed to him, Bernal, his own bond and warrant for the amount of such securities, subject to such reduction as aforesaid; that is to say, for the sum of 11,212*l.* 12*s.* 10*d.*; *and further secured the same by the assignment of a mortgage of property in Dorsetshire*; and that a short time subsequently, he deli-

venson and Mrs. Farquharson, was relied upon by May; but the Master, in his report, dated 19th January, 1809, found that no sum was paid or *bond fide* allowed in account between May and Bernal, when the said two bonds were given up. It further appeared by the report, that the sum of 657*l.* 19*s.* 3*d.* only, was due from Wharton to May in respect of Wharton's securities, and an order on further directions was afterwards made on the basis of this report. See *Wharton v. May*, 5 Ves. 27.

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vered up to May, for 7,500*l.* two post obit bonds for 6,000*l.* each, the only remaining securities of Wharton which he then held; and May, to secure the payment of the said sum of 7,500*l.*, executed to him a bond and warrant of attorney to confess judgment to that amount.

Bernal, by his answer, went on to state the origin of his connexion with May, representing that he had for some years acted as the agent of May, and been in the habit of accepting bills for him; and that on the 8th of June, 1795, May was indebted to him, on the cash and bill account between them, in the sum of 18,032*l.* 7*s.* 6*d.* for money actually advanced for the use of May, over and above various acceptances which he was under for May, amounting to 3,486*l.*, *and independently of* 6,781*l.* 10*s.* 3*d.* *which he represented to be the balance remaining due to him from May, in respect of Wharton's securities,* after making the aforesaid deduction of 8,000*l.*; the answer went on to state, that May, being thus indebted to Bernal, and representing that the Respondent was largely indebted to him, at the solicitation of the Respondent and May, he allowed the latter credit in account for the several sums of 12,000*l.*, 6,000*l.*, 250*l.*, and 5,000*l.*, which allowance to May in account, was in fact the consideration for the Respondent's post obit bonds. The answer then went on to state certain indentures of lease and release, dated respectively the 26th and 27th of February, 1796, between the Respondent and May, the effect of which appeared to be that May, according to the recital, standing indebted to Bernal in the sum of 23,250*l.*, and the Respondent to May in the like or a larger sum, the Respondent had, upon the application of May, executed to Bernal the securities above men-

tioned; and the Respondent thereby assigned to May his life interest, expectant on the death of his father, in the estates therein mentioned, on trust, among other things, to apply the rents and profits in payment of what might be due from May to Bernal; the answer then went on to state an indenture or deed of covenant, dated the 18th of October, 1800, and made between the Respondent and Bernal, whereby the Respondent ratified and confirmed to Bernal the several sums secured by the post obit bonds, with interest from the 5th of January, 1799.

In the month of July, 1804, the Respondent filed an amended or supplemental bill, impeaching the consideration of a bond for 60,000*l.*, dated the 18th of October, 1800, conditioned for the payment by the Respondent of sums due, and which might thereafter become due from May to Bernal, and the bill praying corresponding relief, prayed a discovery as to other securities obtained from the Respondent.

Bernal put in his answer on the 28th of May, 1806, in which he stated transactions between himself and May, as forming the consideration of the last-mentioned bond, which was conditioned for the payment by the Respondent of the sums due, and which might become due, from May to Bernal, and was in its nature similar to the bond for 40,000*l.* (which had been given up to May) but covering other transactions of a later date, and Bernal relied on circumstances, from which he inferred that the Respondent had executed both the bond and deed of the 18th of October, 1800, with due deliberation.

On the 23d of January, 1804, Bernal filed a cross bill against the Respondent, and Edward May and others, stating, among other things, the execution of certain indentures of lease and release, dated the 26th

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and 27th of February, 1796, between the Respondent and Isaac Bernal, which deed of release recited, amongst other things, a certain bond executed by the Respondent and Edward May to Isaac Bernal, bearing date the 24th of December, 1795, in the penal sum of 40,000*l.*, and conditioned to secure the payment to Isaac Bernal of all monies paid and advanced, and to be advanced by him, and acceptances entered into for Edward May; and by the cross bill he prayed an account of what was due to him on the foot of the several securities, and payment out of the estates vested in trustees as therein mentioned.

In the cross bill it was suggested as a pretence on the part of the Respondent and May, that the bonds of Wharton were the consideration for the Respondent's post obit bonds, which is negatived in the usual form, and the cross bill charges, that the real consideration was credit given by Bernal in account to May.

The Respondent put in his answer, and afterwards two further answers to the cross bill.

On the 18th of July, 1805, an order was made in the cause and cross cause, by consent of the parties; whereby it was referred to the Master, to inquire and report whether Isaac Bernal had entered into any and what other securities for the Respondent, besides those mentioned in his answer in the cross cause; and if so, to state the same specially to the Court, and to take an account on foot of all dealings and transactions between Edward May and Isaac Bernal, &c.

This order was afterwards, on the 1st of March, 1806, discharged by the Court; and the Master's report had thereon set aside; but Bernal obtained permission to use, at the hearing of the cause, the depositions which had been taken before the Master.

On the 22d of July, the Respondent dismissed his bill against May, and afterwards examined him as a witness, *but he continued a Defendant in the cross cause.*

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The Respondent and Bernal went into evidence in the original cause, and cross-examined the witnesses of each other. Publication having passed, both causes were set down and came on to be heard together, and on the 9th of June, 1807, the Lord Chancellor pronounced his decree, whereby it was declared, that the four post obit bonds, amounting together to 46,500*l.*, and the bond for 40,000*l.*, and also the warrants of attorney to enter judgment on the same, were obtained by fraud and imposition practised on the Respondent, then an expectant heir, and that the bond for 60,000*l.* was obtained by fraud and imposition upon the Respondent, and that the several bonds and judgments should stand and be a security only for the sums which, on the accounts thereafter directed, should appear to be really due from the Respondent to Bernal; and that the deeds of the 27th of August, 1795, and 18th of October, 1800, were fraudulent and void as against the Respondent; And it was referred to the Master to take an account of all dealings and transactions between the Respondent and Bernal, and of all and every the sum and sums of money received by the Respondent of Bernal himself, or by advances made by Bernal to May, or any other person, for the use of the Respondent, and which came to the hands of the Respondent; and the Master was also to take an account of all sums of money levied by Bernal, under executions issued against the Respondent, and also an account of all sums paid to Bernal by or on account of the Respondent, from time to time; and the Mas-

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ter was directed to set the amount of what should appear to have been levied and paid, against the sum which should appear due on the dealings, transactions, and advances before mentioned, and strike a balance; and the Respondent was ordered to deliver up to Bernal, the several bonds of Wharton then remaining in his possession or power, and to indemnify Bernal against any demand of Symmons, and Bloxam, and Hartsinck, for or on account of any of their demands in the pleadings mentioned; and the Respondent was to have an injunction as prayed, till further order, and all the parties to proceed with effect before the Master, from day to day, and either party was to be at liberty to make up the decree; and in case of the Respondent not speeding the cause before the Master, Bernal was to be at liberty to apply for a receiver, as he might be advised, and on return of the Master's report, such further order would be made as should be fit; and in the cross cause, Bernal's bill was dismissed with costs as to the Defendants who had never appeared thereto, and against whom the bill had been taken *pro confesso*; being all the Defendants, except the Respondent and May; and against them, without costs.

The accounts thus directed were not taken, but on the 3d of February, 1809, Bernal presented a petition of appeal to the House of Lords, in the original cause, praying a reversal of the order of the 1st of March, 1806, entitled in both the causes; and all subsequent orders in such causes, or either of them, and particularly the decree of the 9th of June, 1807, in the first mentioned cause; and on the 6th of February, 1810, (having in the mean time procured the decree in the cross cause to be drawn up) he presented another petition of appeal in the

cross cause, praying a reversal, not only of the order of the 1st of March, 1806, and the orders mentioned in the former petition of appeal, but also the order of the 9th of June, 1807, in the second mentioned cause, and to grant such relief as by the bill in the cross cause was prayed.

The two appeals* were heard together, on the 26th and 28th of March, 1814; and on the 29th of July, 1814, judgment was pronounced therein, whereby the order of the 1st day of March, 1806, was affirmed, but the decree of the 9th of June, 1807, in the first mentioned cause, was reversed; and it was “declared, that the Respondent, by the indenture of the 18th of October, 1800, having acknowledged that the post obit bonds of the 8th day of June, 1795, for 24,000*l.*, of the 20th of June, 1795, for 12,000*l.*, and 500*l.*, and of the 6th of July, 1795, for 10,000*l.*, had been given in consideration of the sums of 12,000*l.*, 6,000*l.*, 250*l.*, and 5,000*l.*, advanced, lent, and paid by Bernal to the Respondent, or for his use, and at his direction and request; and it also appearing that the Respondent’s bond of the same 18th day of October, 1800, was defeasible on payment by the Respondent to Bernal, of several sums of money, advanced and to be advanced by Bernal to or for the use of May, in manner therein mentioned; and such costs, charges, damages, and expenses as therein mentioned; and it appearing by the evidence in the cause, that the drafts of the deed and bond of the 18th of October, 1800, were taken by the Respondent, for the purpose of laying the same before Francis Const, Esquire, in the pleadings named, on behalf of the Respondent, and were afterwards returned by the Respondent to the solicitor for Bernal,

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* MSS. Cases, 1814 and 1815, and Dow. vol. iii. p. 133.

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with a declaration that the same had been perused and approved of by Francis Const, and that the deed and bond were afterwards deliberately executed by the Respondent; and the Respondent having dismissed his bill against May, and examined him as a witness, so that no account could be taken against May, either of his dealings and transactions with the Respondent or with Bernal, the Respondent had debarred himself from impeaching the considerations of the said several securities, as appearing thereon, and as stated in the said deed and bond of the 18th of October, 1800, and that he could not then impeach the said securities for fraud or imposition, or the considerations of the same; but it was further declared, that under the particular circumstances of the case, the said post obit bonds ought to stand as a security only, for the principal sums stated in the said deed of the 18th of October, 1800, to have been the considerations for the same respectively, with interest thereon, at the rate of *5l. per cent. per annum* from the date of the said bonds respectively: And it was thereby further ordered, That it should be referred to one of the Masters of the said Court of Chancery in Ireland, to take an account of what was due to Bernal for principal and interest on the said post obit bonds, according to the declaration aforesaid, and to take an account of what was due to Bernal on the said bond of the 18th of October, 1800, according to the declaration aforesaid: And it was thereby further declared, that on taking such accounts the Respondent must, under the circumstances, *be bound by the accounts settled and stated between May and Bernal, except so far as the Respondent should be able to falsify the same, or shew any errors or overcharges therein*: And it was thereby further ordered, That the said Master should compute interest on the several

sums of money which should appear on taking the said accounts to be due to Bernal, for advances made by him to or for the use of the Respondent or May, and for the debts due from May to Bernal, according to the terms of the said bond, bearing date the 18th of October, 1800 : And it was thereby further ordered, That the said Master in taking such accounts, should make to both parties all just allowances, subject to to the declarations and orders aforesaid : And it was thereby further ordered, That the Master should inquire and state, whether the Respondent had discharged the demands of Hartsinck and Co., John Symmons, and Wilkinson, Bloxam, and Co. ; and if not, it was thereby ordered, That the Respondent should forthwith discharge the same, and fully indemnify Bernal therefrom ; and in case Bernal should have paid, or should pay the same, or any part thereof, then that the said Master should take an account thereof, and charge the Respondent therewith in the accounts before directed, with interest for the same, at the rate of *5l. per cent. per annum*, from the times of such payment respectively : And it was thereby further ordered, That the Master should inquire into whose hands, possession, or power, the bonds of Wharton, in the pleadings mentioned, had come, and how the same had been disposed of, and where the same then were respectively : And it was thereby further ordered, That all further directions should be reserved to the said Court of Chancery, until after the said Master should have made his report : And it was thereby further ordered, That in the mean time, Bernal should be restrained by the injunction of the court from proceeding at law against the Respondent, as to the Court should seem meet : And it was thereby further ordered, That all parties should be

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examined upon interrogatories, touching the matters aforesaid, and produce all deeds, instruments, accounts, papers, and writings, as the said Court should direct: And it was thereby further ordered, That the decree of the 9th of June, 1807, made in the cross cause, dismissing Bernal's bill, should be reversed, and that Bernal should be at liberty to proceed in the said cause, as he should be advised; but in case Bernal should be allowed to proceed at law against the Respondent for any part of his demands, it should be without prejudice to any application which the Respondent might think fit to make to the Court of Chancery, to compel Bernal to make his election, whether he would proceed at law or in Equity: And it was finally ordered, That the Court of Chancery (in Ireland,) should proceed to give all the orders necessary for carrying that order and judgment into execution in both the causes."

May, dying intestate, in the year 1814, subsequently to the hearing of the appeal, Bernal filed his bill of revivor and supplement, to which the Respondent and Sir Humphry May put in their answers, the latter admitting himself to be the brother and heir-at-law of Sir Edward May, deceased; but no further proceedings were had in the cross cause.

The order of the House of Lords having been transmitted to the Court of Chancery in Ireland, was made an order of that court; and it was accordingly referred to Thomas Ball, Esq., one of the Masters of the court, to take the accounts directed by the order; and thereupon Isaac Bernal filed two charges, one on foot of the post obit bonds, and the other on foot of the bond of the 18th of October, 1800; and the Respondent filed discharges thereto; but before any effectual progress was made in the ac-


counts, Isaac Bernal died, whereupon the present Appellants, as his executors, on the 27th of September, 1821, filed their bill of revivor in the Court of Chancery in Ireland, against the Respondent, praying that they might be at liberty to revive the first mentioned cause, which had abated by the death of Isaac Bernal, and that they might have the benefit of the judgment pronounced in the appeal; and the Respondent having appeared to the bill of revivor, it was ordered by the Court, on the 10th of November, 1821, that the first mentioned cause should stand and be revived.

To support the latter charge, the Appellants produced before the Master the bond and deed of the 18th of October, 1800, and also the book in which was contained the accounts alleged to have been stated and settled between Bernal and May, on the foot of the last of which there appeared a balance due from May to Bernal, on the 1st of June, 1801, of 24,372*l.* 12*s.* 4*d.* which the Master admitted as *prima facie* evidence of the amount of the charge.

The book so produced, commenced with an account current between Bernal and May, of their general bill and cash transactions, beginning in the year 1791, which account is continued to the end of the tenth folio of the book, from whence it is carried to folio fifteen. In two of the intervening folios, namely, eleven and twelve, is contained the statement of the accounts settled between May and Bernal, on foot of the alleged transfer from the latter to the former, of Wharton's original securities.

The transaction is there stated in this way:—the first set of securities, amounting to 19,212*l.* 12*s.* 10*d.* sterling, is stated to have been delivered to May, for which he gives his bond, dated the 3d of July, 1794, for 11,212*l.* 12*s.* 10*d.* bearing interest, and

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gives credit for two sums of 4,000*l.* each ; one stated to have been paid to a Mr. Williams ; the other, Bernal is to deduct from Joshua Mendes Da Costa ; making altogether 19,212*l.* 12*s.* 10*d.* ;—another set of Wharton's securities, to wit, two post obit bonds for 6,000*l.* each, are stated to be sold to May for the sum of 7,500*l.*, for which sum he gives his bond to Bernal, dated the same day, bearing interest.

In the twelfth page of the book, the two bonds which May had passed for Wharton's securities, to wit, the one for 11,212*l.* 12*s.* 10*d.*, and the other for 7,500*l.* are charged to him with a sum of 637*l.* 12*s.* 6*d.* stated to be agreed to be charged for interest on the account, making together the sum of 19,350*l.* 5*s.* 4*d.* ; and this sum is written off on the credit side, by cash, and by sundry bills, notes, and other securities received by Bernal, amounting precisely to 19,350*l.* 5*s.* 4*d.*, the greater part of which, namely, 12,804*l.* 2*s.* 9*d.*, appears to have been paid and given by May after Wharton's bill had been filed to impeach the securities, and pending the litigation with him. Amongst these credits, in order to make up the precise sum, are portions of the Respondent's post obit bonds, entered as follows : "1795, June 8th, by money secured on bonds of Lord Belfast, 3,000*l.*," and (after intervening payments,) "September 17th, by money secured on bond of Lord Belfast, 4,000*l.*"

In this way, the alleged sale of Wharton's securities to May, appears by the book to be closed, settled, and paid for.

In his answer to the Respondent's original bill, Bernal stated, that he gave credit to May for two sums of 3,000*l.* and 4,000*l.*, part of the said bonds, in liquidation of the balance then due from May to him, on the foot of Wharton's securities, and for the remainder of

the post obit bonds, by applying them in part and further liquidation of the cash and bill account between him and May.

Two leaves of the book, containing part of the last mentioned account, namely, the credit side of folio 11, and the debtor and creditor sides of folio 12, appeared to have been either cut out, or worn and detached by use.

From folio 15, the account current which had been brought over from folio 10, is continued with occasional interruption, and occupies the greater part of the book; balances are from time to time struck and signed by May; by the last balance so signed, the sum of 24,372*l.* 12*s.* 4*d.* appears due from May to Bernal, on the 1st of June, 1801.

The Master having admitted the book as *prima facie* evidence, that the sum of 24,372*l.* 12*s.* 4*d.* was due from May to Bernal on the 1st of June, 1801, as the balance of the last account stated and settled between them, the Respondent proceeded to falsify these settled accounts, under the liberty given to him by the order made on the appeal.

With this view, the Respondent insisted that the different payments made by May to Bernal, from August, 1794, to September, 1795, and which in the book as it appeared, are placed to the credit of the alleged sale of Wharton's securities, ought to be placed to the credit of the general account of bills and cash transactions between May and Bernal, at the respective dates when such payments took place, without having regard to the pretended sale of Wharton's securities from Bernal to May. Because, as he contended, there was evidence on the face of the book of accounts, and in the nature of the dealings between Bernal and May, and also in the proceedings in the

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cause of *Wharton v. May, Bernal*, and others,* to warrant a presumption, that these payments were made by May to Bernal, on account of the bill and cash transactions between them, and that the same were originally placed to the credit of the bill and cash account, and that afterwards, when Mr. Wharton, by his bill in the Court of Chancery in England, (filed in February, 1795) had impeached the securities which had been obtained from him, as obtained by fraud, and without consideration, the accounts between Bernal and May were fraudulently altered, with a view to impose on the Court of Chancery in that cause, by representing May as a purchaser of Wharton's securities, for valuable consideration; that with this view, the account now appearing in the 11th and 12th pages of the book was made out, and credits to the exact amount necessary to balance that account, were withdrawn from the bill and cash account; and this fraud, which was originally resorted to against Wharton, was afterwards turned against the Respondent, thus making a large balance appear to be due from May to Bernal, when, in truth, none was due.

At folio 10 of the book, the left-hand side being insufficient for the debits, they are brought over to the right-hand or credit side of the book, under the credits; and in performing the operation, entries under date of the 20th of June, 1795, have been placed immediately under the credits of the 17th of September, in the same year; so in folio 24, entries of the 5th of September, 1797, occur under entries of the 17th of November. The credits in folio 12, purporting to be payments at different times, from August, 1794, to September, 1795, from the colour of the ink, and the

* 5 Ves. p. 27.

manner of the hand-writing, appeared to have been written at one time. This book was represented by Bernal to be the original book, containing the only account of these transactions, and no other was produced.

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Daniel Collyer, a solicitor, proved in the cause, that in the year 1804, May had, in his presence, taxed Bernal to his face, with fraud in the accounts between them, and undertook to point out the places in which Bernal's account book had been mutilated, and that upon Bernal's producing the book as he then did, May opened it, and pointed to the part in which the leaves had been torn out. The Respondent also produced plain copies of the proceedings in the cause of *Wharton v. May*, which, to save the expense of attested copies, were admitted by the Master, by the consent of all parties, the Master certifying such admission and consent.

On the 29th of November, 1822, the Master made his report, whereby he certified that he had proceeded in the accounts and inquiries directed, and found, "that there was then due from the Respondent to the Appellants, (as executor and executrixes of the will of Bernal,) the sum of 23,470*l.* 13*s.* 5½*d.* British, for four principal sums of 12,000*l.*, 6,000*l.*, 250*l.*, and 5,000*l.*, and a small arrear of interest, after crediting the monies theretofore received and levied, under the several judgments obtained on the authority of the several warrants of attorney, collateral with the bonds, (the particulars of which he had set forth in the Schedule to his Report): And he further certified, That in proceeding to take the accounts directed on the foot of the before-mentioned bond, bearing date the 18th day of October, 1800, he found that the last settlement of accounts between Bernal and May, was

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up to the 1st day of June, 1801, and that on that day, it was agreed between them, that there was 24,372*l.* 12*s.* 4*d.* British money, due from May to Bernal, including four bills of exchange amounting together to 2,602*l.* 12*s.* then outstanding, over-due and unpaid, which he found, by an indenture bearing date the 4th of February, 1802, and made between May of the one part, and Bernal of the other part, were severally and respectively to be deducted from the said 24,372*l.* 12*s.* 4*d.* when the same should severally and respectively be delivered up by May to Bernal, to be cancelled, and exclusive of three several collateral securities which Bernal had entered into for May to Messrs. Wilkinson, Bloxam, and Co., John Symmons, and Messrs. Hartsinck and Co.; but the Respondent having made it appear to him, that such balance of 24,372*l.* 12*s.* 4*d.* ought not only to be reduced by the amount of three out of the before-mentioned bills, amounting together to 2,392*l.* 12*s.* (the fourth having been paid by Bernal), but also by the amount of sundry payments which May made to Bernal in the years 1794 and 1795, to the extent of 19,350*l.* 5*s.* 4*d.* British, for divers securities of Wharton to the nominal amount of 31,212*l.* 12*s.* 10*d.* British, but for which it appeared May ultimately recovered only 354*l.* 3*s.* 3*d.* exclusive of interest; he had in taking the said last-mentioned accounts, made what he conceived to be the proper additions and deductions on foot of the said last settled account of the 1st of June, 1801, between May and Bernal, and in so doing he had, as against the said 19,350*l.* 5*s.* 4*d.* charged May's account with the amount of one of Wharton's securities for 2,900*l.*, which, antecedently to the 1st of July, 1794, had been passed by May to Bernal, because Bernal

originally received the same from, and gave May credit for the full amount thereof, and he had also charged May's account with the before mentioned sum of 354*l.* 3*s.* 3*d.*, and the amount of sundry costs, which had been proved before him to have been paid by Bernal on May's account, and two sums of 75*l.* 2*s.* 5*d.*, and 84*l.* 2*s.* 5*d.*, the amount of two bills of exchange originally received of, and credited to May, but not paid when due; and he had deducted from the said account all interest charged in the said settled accounts, by which the balance of the last settled account ending the 1st of June, 1801, was ultimately reduced from 24,372*l.* 12*s.* 4*d.* to 4,164*l.* 4*s.* 7*d.*, from which 4,164*l.* 4*s.* 7*d.* he had afterwards deducted the amount of a bill of exchange of 592*l.* 12*s.* 0*d.*, which Bernal originally accepted for the accommodation of May, and which he found May ultimately got up and returned to Bernal in the year 1802, and also two other sums of 800*l.* and 1,000*l.* for two other bills of exchange originally accepted by Bernal for May's accommodation, which were yet outstanding unpaid by Bernal, and against the payment of which with interest, the Respondent was to indemnify the Appellants as executors of Bernal, by which the ultimately reduced balance of the last settled account between May and Bernal was brought to the sum of 1,771*l.* 12*s.* 7*d.*, from the foot of which he had taken the subsequent account, and calculated interest as directed, and he found that there was a sum of 245*l.* 2*s.* 3*d.* British money, overpaid and in favour of the Respondent, as appeared by the second Schedule annexed to his Report, which 245*l.* 2*s.* 3*d.* he had deducted from the before-mentioned sum of 23,470*l.* 3*s.* 5½*d.* remaining due at the foot of the first Schedule, whereby the whole sum then due from the Respondent to the Appellants, (as

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executor and executrixes of the will of Bernal,) was reduced to the sum of 23,225*l.* 11*s.* 2½*d.* British, making 25,161*l.* 0*s.* 5*d.* sterling Irish money," &c. The Master then went on to state in the Report the result of the other matters referred to him.

To this report the following exceptions were taken by the Appellants:—

First Exception.—FOR that the Master in taking that part of the account directed to be taken on the foot of the bond of the 18th of October, 1800, had certified, "that on the last settlement of accounts between Isaac Bernal and Edward May, it was agreed between them, that 24,372*l.* 12*s.* 4*d.* British Money, was due from the said Edward May to the said Isaac Bernal, (including four bills of exchange and some other securities therein particularly mentioned,) yet the Marquis, having made it appear to the Master that the said balance of 24,372*l.* 12*s.* 4*d.* ought not only to be reduced by the amount of certain bills therein mentioned, but also by the amount of various payments which Edward May made to Isaac Bernal, in the years 1794 and 1795, to the extent of 19,350*l.* 5*s.* 4*d.* for divers securities of John Hall Wharton, to the nominal amount of 31,212*l.* 12*s.* 10*d.* but for which Edward May ultimately recovered only 354*l.* 3*s.* 3*d.* exclusive of interest, and that the said Master had deducted from the last settled account of the 1st of June, 1801, the monies and securities to the amount of 19,350*l.* 5*s.* 4*d.* so paid by Edward May to Isaac Bernal for Wharton's securities, and all interest charged on the settled accounts therein referred to, by which the balance of the last settled account, ending the 1st of June, 1801, was reduced from 24,372*l.* 12*s.* 4*d.* to 4,164*l.* 4*s.* 7*d.* British, and by means of which with some other debits and credits, the report found, that there was a sum of 245*l.* 2*s.* 3*d.* British,

overpaid and in favour of the Marquis," which finding, so far as related to Wharton's securities, the Master was not warranted in adopting, by the decree therein mentioned, (giving to the Marquis a right to falsify or shew error or overcharges in the said settled accounts,) or by the evidence before him.

Second Exception.—FOR that the said Master varied the balance of the said settled accounts, by debiting the said Isaac Bernal with 19,354*l.* 5*s.* 4*d.* as the amount of various payments made by Edward May to Isaac Bernal, in the years 1794 and 1795, for divers securities of the said John Hall Wharton, to the nominal amount of 31,212*l.* 12*s.* 10*d.* and did not credit the said Isaac Bernal on the foot of the said security, with the sum which Edward May had agreed to credit, and did actually credit the said Isaac Bernal with, whereby the balance appearing by the last settled account, in the said decree mentioned to be due from the said Edward May to Isaac Bernal, on the 1st of June, 1801, namely, 24,372*l.* 12*s.* 4*d.* was reduced to 4,164*l.* 4*s.* 7*d.* British: And the report also stated, "That the whole of the said balance was not only discharged, but the balance turned against the said Isaac Bernal, by a sum of 245*l.* 2*s.* 3*d.*," in which variation the Master was not warranted by any evidence laid before him, even though he was warranted (which the Appellants denied,) in entering into an investigation of the equities between the said Edward May and Isaac Bernal, touching Wharton's securities, or into the considerations given for the same, according to the agreement of the parties.

These exceptions being over-ruled, the cause was heard upon further directions, on the 3d of February, 1823, when it was decreed, "That the receiver in the cause should forthwith account, and pay over to the Appellants the balance in his hands, in liquida-

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tion of the 25,161*l.* 0*s.* 5*d.*, reported due to the Appellants, and that the Respondent should pay to the Appellants the balance (if any should appear due to them, after such payment,) within six months, with interest, at 5*l.* per cent. from the date of the said report, until paid, and that in the mean time, the receiver should be continued, with liberty to the Appellants to apply, from time to time, as they should see fit, and that the receiver should pay over to them such further sums as he might receive, until the said principal sum, reported due to the Appellants for principal and interest, should be fully paid off, and that all parties should be at liberty to apply to the Court, as they should be advised, and that each of the parties should abide their own costs.

Against this order of the 3d of February, 1823, the appeal was presented.

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In the course of the argument the Lord Chancellor made the following observations: *

The Lord Chancellor.—I wish the Respondents first to state, whether a sum is not agreed on as the result of a settled account, which is to be surcharged and falsified: And then to point out what are the sums which they mean to withdraw from that account on the ground of what is called falsifying. Neither party, as it appears to me, object on the record to the 24,372*l.* being taken as the result of a settled account; then, the question is, what is the meaning of the words “falsify or surcharge” in this decree? The next question will be, in pointing out what it is that they mean to withdraw from that account, how they are to make it out that that can, according to

* These are given very fully, because the judgment was afterwards affirmed without farther observation.

the true intent and meaning of the words " falsify or surcharge," be withdrawn.


How does it appear that this part of the book laid before the Master makes the balance 24,372l. ? Do not understand me that I cannot find such and such evidence; I want to see the course of the thing. What the Master says is this, " and in proceeding to take the accounts directed under the before mentioned bond, bearing date the 18th of October, 1800, in the penal sum of 80,000l. British money, I find that the last settlement of accounts between the said Isaac Bernal and the said Edward May, was up to the 1st of June, 1801." First of all I want to know what it is the Respondent objects to? Not how he makes it out. The ordinary course of falsifying is, to point out some sum. You must begin by shewing that what is in pages 11 and 12 forms part of the charge in this book.

The case stated by the Respondent, as I understand it, is this: May is made debtor for 19,350l. on two bonds that are mentioned, one of the 21st of July, and the other of the 12th of December, and interest on those; and on the other side he has credit given to him for a great number of bills, amounting to the sum of 19,350l. The Respondent contends that he ought to have credit given to him for that 19,350l., but that he ought not to have been debited with the other. The Master's report is to this effect:—he says, that on that day it was agreed between them that there was 24,372l. 12s. 4d. British money, due from May to Bernal, including four bills of exchange, amounting together to 2,602l. 12s., then outstanding, over due, and unpaid, which I find by an indenture bearing date the 11th of February, 1802, made between Edward May of the one part, and Isaac Bernal of the other part, were severally to be deducted from

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said 24,372*l.* 12*s.* 4*d.*, when the same should severally and respectively be delivered up by May to Bernal to be cancelled.

Then the first thing to be proved here is, that it does appear by that indenture of the 4th of February, 1802, that these bills were to be so delivered up. What is the evidence of that? Where is that indenture? How does that appear? The report goes on to say, "but the Defendant having made it appear to me that such balance of 24,372*l.* 12*s.* 4*d.* ought not only to be reduced by the amount of three out of the before mentioned four bills, amounting together to 2,392*l.* 12*s.*, (the fourth having been paid by Isaac Bernal) but also by the amount of various payments which May made to Bernal in the years 1794 and 1795, to the extent of 19,350*l.* 5*s.* 4*d.* British, for divers securities of said John Hall Wharton, to the nominal amount of 31,212*l.* 12*s.* 10*d.* British, but for which it appears May ultimately recovered only 354*l.*" Now it is upon those who are to support the Master's Report to prove those facts as there stated. The Appellant quarrels with the Master's Report because it has stated such and such deductions to be made, and such and such evidence to be referred to. Then I say you are not at liberty here to prove that those deductions ought to be made, except on the evidence on which the Master has made the deductions.

They take the exceptions in two ways;—they say, first, that the exceptions are such that the report ought to be reviewed; and further, that the whole Judgment should be set aside: And then they put it very fairly again in their exceptions, that you are to shew that these deductions made by the Master, are made properly on the effect of the evidence on which he has proceeded, and not on all the rest of the evidence which you may think proper to bring to this

bar; and then that being so properly made, they fall within the meaning of the word "falsifying."

You must shew that the Master is authorized by the evidence to which he there refers to have made that report. You see their exceptions expressly mention the evidence. I allude to that part which goes to the extent of 19,350*l.*, and that as a part of 31,212*l.* There you see the exception expressly says, "(that so far as relates to the payments made or securities given to Bernal by May, on account of Wharton's securities, handed to May by Bernal) he ought not to have come to or adopted such report; not being warranted so to do by the true construction of the judgment or decree in the report mentioned (giving to the Defendant a right to falsify or shew error or overcharge in the settled accounts)." That is one principle of opposing it—"or by the evidence appearing before him on the taking of the account." Then you must point out what was the evidence before him on taking the account.

If the decree in *Wharton v. May* is to be considered as evidence, (and the Master, in his Report, states that was agreed to be evidence,) you must state the case of *Wharton v. May*. We must see how you apply *Wharton v. May* to the question of *May v. Bernal*.

The Master says, that it was consented between the parties to save the expense of bringing over and proving attested copies thereof, that plain copies of the following orders, reports, exceptions, decrees, and proceedings, in the cause of Wharton against May and others, should be read in evidence before me in these causes as if duly proved, and which were accordingly read in evidence before me, namely; Decree dated 25th of June, 1799; The Master's report and

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Schedules pursuant thereto, dated 30th of July, 1806 ; Plaintiffs and Defendants exceptions thereto ; Order of the House of Lords on the appeal in the cause, bearing date the 10th of August, 1807 ; Order on hearing exceptions to the Master's report bearing date 11th of February, 1808 ; Order bearing date 9th of December, 1808, that Master's report should state result of Schedules on the exceptions sent back ; Report of the Master, dated 19th of January, 1809 ; Decree dated 25th of July, 1809. These were read by consent.

How do you understand that at the bar?—were the proceedings in *Wharton v. May* agreed to be read in evidence ? If not, you must state the case of *Wharton v. May*, so as to shew that in taking the account between *May v. Bernal*, those proceedings should have been received. The great difficulty that one has in the case is this, that all that the Master says in his report is, that “the Defendant having made it appear, to me that such balance, &c.” The Court is to know in what way the Defendant had made that appear to the Master ; what have we in proof as to how the Defendant made it appear. Instead of printing this immense mass of evidence, they should have put in the evidence, which the Master had before him. That would have been in compliance with the rules and orders of the House. The rules of the House require that the evidence should be printed, on which the Master proceeded. It appears by these papers that the Lord Chancellor called on the Master to certify on what evidence he had proceeded, and accordingly he certified that he had proceeded on all these causes and reports and so on, and all this seems to have been without objection ; then we have in the Irish cause the notes on the hearing, and I do not find there was any objection made in the argument before the Chancellor to reading all these.

It appears on the notes which I have been reading, that a great many deeds were read before the Chancellor, not one of which have been read to day. The Master, in answer to the application of the Lord Chancellor, says, "I certify that it was admitted by all the parties before me on the enquiry, directed by the order of the House of Lords, that the securities of John Hall Wharton mentioned in these causes, and also in the accounts between the said Isaac Bernal and Edward May deceased, were the same as those mentioned in the cause instituted in England by the said John Hall Wharton against the Defendant, the Marquis of Donegal, and the said Edward May and Isaac Bernal; and it was also consented to save the expense of bringing over and proving attested copies thereof, that plain copies of the following orders, reports, exceptions, decrees, and proceedings in the said cause of *Wharton v. May* and others, should be read in evidence before me in these causes, as if duly proved, and which were accordingly read in evidence before me." (He does not state that there was any objection to their being read in evidence)—"Namely a decree, &c."—and he goes through all these particulars. Then upon the hearing of the cause these are all offered in evidence, no objection is made to them on the part of Mr. Bernal's counsel, and a great many deeds are stated as being read. This account also was stated as having been produced in evidence, and then the Court decides on the matter which now appears on the exceptions.

The question therefore is, what was the view of the case taken in the Court below. There is no doubt that in an order giving leave to surcharge and falsify as far as the word "falsify" is concerned, it is neither more nor less than an authority under which due proof and evidence ought to be produced. But, in this case, it

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comes to be a matter of question, quite different as to the word "falsify," whether the narrow or strict sense of falsifying is to be adopted by this House. If that is to be so, the fact then is this, that the parties in the Court below proceeded on one ground, and then they come here to undo all that has been done there, as it is represented. The fact may be in dispute. The question is, what was the matter disputed before the Court below? And undoubtedly that again gives rise to another observation, which is this; if the Court below decided in confirmation of the Master's report upon the evidence on which he should have made that report and other evidence, then the Court was wrong: Unless that other evidence was by consent of the parties.

Mr. Hart.—The gentleman who attended this cause in Ireland happens to be at the bar of the House. He says he took the objection over and over again that it was evidence which did not apply to this cause before the Master.

The Lord Chancellor.—He might take the objection, but did he take any objection to the admission of it as evidence, leaving the Court and Master to decide?

23d Feb. 1826. *Mr. Hart.*—At the instance of May, Bernal had given up these bonds, and as I apprehend on the principles of every court of justice, if Mr. May perfectly conusant of all the circumstances between himself, Mr. Wharton and Mr. Bernal had thought fit to make a purchase of those securities of Mr. Wharton's for a specified sum, giving his bond by way of payment, it was quite immaterial whether the securities that he so purchased, turned out to be worth one farthing or not.

The Lord Chancellor.—Was the point you now make, entered into in the Court below?

Mr. Hart.—I cannot tell what points were made in the Court below.

The Lord Chancellor.—According to the notes, no such thing appears to have been mentioned. There are two points: first, whether the evidence in the cause of Wharton and May, was to be received at all; and secondly, if that evidence was to be received, whether the securities may not be taken at the value represented in this account.

It may be necessary to enquire of the Court below, what were the grounds of decision. If cases come here on points which were not discussed, it is not an appeal, but a new cause. I do not mean to stop you; on the contrary, I think it a very material point.

Mr. Hart.—I hope your Lordship will not think the Appellant bound by the omission of his counsel below.

The Lord Chancellor.—Perhaps not; but if the client comes here to state points that were not made before the Court in Ireland, he ought to pay the expenses of coming here, if the thing is sent back again. He must do that at least.

What they say is this: here is a bond or security, which was sold by May to Bernal, apparently for so much money; they say, that notwithstanding that appears on the face of the instrument, it is worth only so much less, and that therefore they ought not to be charged with such a sum of money. Then comes the question, was it or was it not before the Court in Ireland, alleged that what appeared on the face of the instrument could not be disputed? You see the allegation on the one side is "you owe me such a sum of money, on such a bond:" the allegation on the other side is, "no, I do not owe you that money on

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the bond, because whatever appears on the face of the bond is not what is due between you and May." It is on the party who thinks that he can make out this point that the bond shall be the rule of evidence, and that no further enquiry shall be made but what appears on the face of the bond, to insist on that bond.

I am not saying, or presuming to say, what the effect of this "falsifying and surcharging is," as to whether it falls within that rule; I never can suppose the Master went on falsifying and surcharging in the way he has done, unless the parties called on him to do so. His report is to that effect.

Can we understand that unless we have the information on both sides, from gentlemen at the bar, to say that was the case. The first exception goes on the point, that the equities as between Wharton and May, were not to be considered as equities as between May and Bernal, that is a succinct and distinct proposition of law. The second exception is, that the Master would not be warranted in his conclusion, even if he did take those equities into consideration, by agreement of the parties; and therefore the Court refers to him to know what the parties have done before, and he makes a certificate, which seems to me to imply that this was by agreement of the parties, and the Court seems to have proceeded on that. It is very material that we should know what the Court really proceeded on, because, if it was upon an agreement between the parties (and that it might be so is clear from the language of the second exception,) we ought to know whether there was such an agreement as that—that is, whether the Court proceeded on the notion that there was such an agreement.

Take Mr. Wallace's view according to the exceptions. Mr. Wallace is the counsel who signs the ex-

ceptions; and the second exception is, "that the Master was not warranted in what he has done by any evidence laid before him, even though he was warranted (which the Plaintiffs deny,) in entering into any investigation of the securities between May and Bernal touching Wharton's securities, or into the considerations given for the same according to the agreement that was entered into between the parties." Now what was that agreement?

Mr Hart.—That agreement was to substitute attested copies instead of originals.

The Lord Chancellor.—That is not the effect of the certificate. Your first exception is, that there was no ground for the decision from any thing that passed between Wharton and May. The second exception is, that if there was an agreement between the parties to admit that evidence, it did not authorize the report.

If Bernal sold to May *post obit* bonds, stating that he had paid 6,000*l.*, or any other sum, and it should appear in the proceedings of the other cause that he had not paid one farthing for them; supposing it to be open to Bernal in the other cause to have contended if such thing should appear, that amongst the bonds he had given to May—(sold to May, if you please so to put it): that he stated that, in consideration of a sum of 1,000*l.*, or any other sum to be mentioned, he had got a *post obit* bond for a sum of money payable on certain conditions, and that it should appear on evidence that should bind him in the cause, that he had paid nothing for that *post obit* bond, would that be conclusive as to May unless he had subsequently acquiesced? That leads me to ask you whether there was any evidence in the Court below

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of Bernal's state of facts carried in before Master Ball? * It would be open to a question of a rather singular nature, because that state of facts seems to contend this, that if at any time May had had an equity of the same nature of Wharton's, yet that May's subsequent transactions might deprive him of that equity: whether that would be a consideration that the Master could have gone into, consistently with the order of the House of Lords, may be another question: but whether the House of Lords may not, on that footing, if there was evidence with respect to the state of facts itself, direct some enquiries in order to get at the fact of such subsequent conduct on the part of May, would be another question.

The report takes no notice at all of that state of facts which was carried in by Bernal, nor could the report take any notice of it, because there was no evidence given in support of that state of facts. There do appear to me to be some considerable points mentioned in Bernal's state of facts.

You see Bernal in his state of facts means to establish that May cheated Wharton, and cheated himself beyond all example; and he means also to state that the transactions which May was concerned in, subsequently to the sale of these securities to May, were such as would cut all equity from under his feet, even if there could have been equity at the moment of that sale of the bonds to him. For that reason I ask whether that state of facts was at all supported before the Master.

Mr. Hart.—I have made no observation on what has been said impugning the book about spoliation, because the intrinsic evidence of that paper itself, is

* See the Appendix to the printed cases.

only that time and use have separated those sheets from the mass of the book itself.

The Lord Chancellor.—I think that appears to be the case.

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After the Argument which took place in 1826, the case stood over for judgment.

On the 25th of June, 1827, the judgment of the Court below was affirmed, on the motion of Lord Eldon, without further observation.

Judgment Affirmed.

and for the purpose of the present report, it is not necessary to
investigate the matter further, but it is necessary to state that the
matter is not yet settled.

Respectfully,
[Signature]

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APPENDIX.

(SCOTLAND.)

Court of Session.

HUGH ARBUCKLE - - *Appellant.*CAMPBELL INNES and others - *Respondents.*

In a proceeding under the stat. 7 Geo. 2. c. 16. sec. 7 and 16. Geo. 2. c. 2. sec. 24.—a party having appeared as proxy for an elector at the annual election of Magistrates and Councilors of a borough,—leaves Scotland in a ship, of which he is Master, upon a voyage to France and back,—having before his departure communicated with his legal agent upon the subject of a petition to the Court of Session, against the proceedings at the election; and during his absence, and before the expiration of two months from the election, he transmits to the same agent a letter upon the subject. The agent, thereupon, presents the petition in the name of the proxy, and the proceeding is commenced before the expiration of the two months. The proxy does not return to Scotland until after the expiration of the two months, but then recognises the proceeding as instituted by his authority. Held by the Court of Session that there was not, under these circumstances, a sufficient mandatory for the proceeding, and this judgment was affirmed on appeal, but with much hesitation.

ON the 25th of November, 1825, a petition and complaint was presented to the Court of Session, at the instance of the Appellant Hugh Arbuckle, and of James M'Bain, deacon of the incorporation of tailors of the Burgh of Queensferry, both of them constituent members of the meeting for the annual election of the magistrates and councillors of that burgh, held on the

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29th day of September preceding, complaining of certain wrongs and abuses committed in the course of the election, and praying that the election of magistrates and councillors, said to have taken place at that meeting should be found to be illegal, and should be reduced and set aside.

The petition is in name of James M'Bain, and Hugh Arbuckle, proxy, chosen in room of one of the electors of the magistrates of the burgh, constituent members of the meeting for the annual election of the magistrates and councillors of the burgh of Queensferry, held on the 29th day of September last.

It sets forth, " That by act of the 7th Geo. 2. " c. 16. s. 7. relating to the election of magistrates " of royal burghs, it is declared, ' That it shall and " may be lawful to and for any magistrate or council- " lor of the burgh, who apprehends any wrong was " done at any annual election, to bring his action be- " fore the Court of Session in Scotland, for rectifying " such abuse, or for making void the whole election " (if illegal) only within the space of eight weeks after " such election is over.' "

" That by another act passed in the 16th Geo. 2. " cap. 2. sect. 24." it is further provided and declared, " That it shall and may be lawful to and for any con- " stituent member, at any meeting for election of ma- " gistrates and councillors, or of any meetings pre- " vious to that for election of magistrates and coun- " cillors respectively, who shall apprehend any wrong " to have been done by the majority of such meeting, " to apply to the said Court of Session, by a summary " complaint, for rectifying such abuse, or for making " void the whole election made by the said majority, " or for declaring and ascertaining the election made, " by the majority, so as such complaint be presented

“ to the said Court of Session, within two calendar
 “ months after the annual election of the magistrates
 “ and councillors.”

Then follows a statement of the particular grounds of complaint.

The petition and complaint was boxed on the 25th of November, 1825.

The petition being served upon the persons complained of, they lodged their answer, which, besides a statement of the Respondents' pleas upon the merits, contain an objection to the title of both the complainers. But the title of the complainer M'Bain was not at issue under the present appeal, which involves merely the title of the complainer Hugh Arbuckle, and the competency of the complaint, so far as at his instance.

“ The objection as to Hugh Arbuckle was, that he
 “ left Scotland a day or two after the Michaelmas elec-
 “ tion, on a foreign voyage, and was out of the king-
 “ dom at the time when the complaint was presented :
 “ that no mandate, or other authority granted by
 “ him, has been produced, authorising the complaint
 “ to be presented.”

On the part of the Appellant it was alleged that he had given verbal instructions for the proceeding before his departure.

And afterwards addressed to his legal agent in Edinburgh, the following letter, which was received and acted upon before the expiration of the two months from the election.

“ *Dieppe, in France, 7th Nov. 1825.*

“ Dear Sir,

“ I have been detained here with contrary winds for
 “ this fortnight. I expected when I saw you, to have
 “ been on my passage home from Rotterdam before
 “ this time. I have to go there for a cargo, and I

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“ hope not to be long detained. Prefixed I send you
 “ a memorandum about our Michaelmas election. I
 “ expect that you have got the minutes of election.
 “ Should you want any farther information on the
 “ subject, write me, to the care of Messrs. D. Bar-
 “ ger and Son, Rotterdam, and I will attend to it
 “ immediately. I think the burgh will be very easily
 “ got set aside; and should it be necessary for you,
 “ I will rather come home from Rotterdam, by the
 “ way of London, as you should be disappointed. I
 “ have no doubt that Deacon M'Bain will allow you
 “ to use his name in the petition and complaint. Mr.
 “ Melville could speak to him, or I could send word
 “ over from Rotterdam to my mother for him to go
 “ into Edinburgh to speak to Mr. M. Perhaps in
 “ the petition and complaint it might be as well to
 “ conclude for the penalties of 100*l.* for each person
 “ acting, who may be found disqualified. I remain,
 “ dear Sir, yours truly

(Signed)

“ HU. ARBUCKLE.”

(Addressed)

“ James Gibson Craig, North Street,
 Andrew's Street, Edinburgh.”

The following pleas, in point of law, were sub-
 mitted on the part of the complainers, in regard to the
 title of the Appellant.

“ 1. The complainers, being both natives of this
 “ country, no written mandate was required before
 “ this complaint could competently proceed at their
 “ instance, even though it be true that one of them
 “ was out of the country in the course of his business
 “ on the particular day on which the complaint was
 “ presented.”

“ 2. The complainer, Hugh Arbuckle, having
 “ been chosen a proxy for an absent elector, and the

“ other complainer, James M'Bain, as deacon of the
 “ incorporation of Tailors, having been one of the
 “ body of electors, they were both constituent mem-
 “ bers of the meeting of election, and entitled to
 “ bring the present complaint, under the statutes there
 “ founded on.”


There was a third plea on the point of title; but it relates solely to the title of M'Bain.

The following are the pleas which were stated for the Respondents, with regard to the Appellant's title:

“ I. As to the title of Hugh Arbuckle. The Re-
 “ spondents maintain, in point of law, that the pre-
 “ sent petition and complaint cannot be insisted on, in
 “ the name, and at the instance, of Hugh Arbuckle,
 “ because,

“ 1. At the time when the present petition and com-
 “ plaint, at the instance of Hugh Arbuckle, was pre-
 “ sented, Hugh Arbuckle, being forth of the kingdom
 “ and beyond seas, and having left no mandate to
 “ enable any one to appear as his mandatory, no peti-
 “ tion and complaint was, in law, presented within the
 “ statutory period at the instance of the said Hugh
 “ Arbuckle.

“ 2. As Hugh Arbuckle was forth of the kingdom,
 “ and beyond seas, no complaint of the nature of the
 “ present one could competently be presented, with-
 “ out an express mandate to that effect, granted by
 “ him in favour of the counsel who signed it, or
 “ of some individual who, in the complaint, caused
 “ himself to be designed as the mandatory of Hugh
 “ Arbuckle. 1681, February 3. ——— against
 “ Stuart of Archattan, Morr. 353. 1780, July 30.
 “ Major Alexander Dundas against Alexander Fergu-
 “ son, Morr. 8837. 1802, July 6. Davidson against

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“ Elphinstone, Morr. 8842. 28th February, 1818,

“ Cameron against M^rNab, F. C. 436.

“ 3. The Respondents maintain that the letter
 “ which has been produced by the complainers, al-
 “ though it contains memoranda and information as
 “ to the election at the burgh of Queensferry, at
 “ Michaelmas, 1826, for the use of ‘ James Gibson
 “ Craig, Esq.’ to whom it is addressed, and states
 “ the writer’s willingness to promote the wish of
 “ that gentleman, in regard to the politics of the
 “ burgh, contains no mandate which could legally
 “ have authorized Mr. Gibson Craig to have raised
 “ the present complaint as at the instance of Hugh
 “ Arbuckle, or in it to have designed himself Ar-
 “ buckle’s mandatory, and still less any counsel to
 “ have signed such complaint, or any other party to
 “ appear for Arbuckle as mandatory.

“ 4. This complaint was not originally presented at
 “ the instance of Hugh Arbuckle. Nothing done by
 “ him, after the statutory period had elapsed, can
 “ have the effect of causing this complaint to be con-
 “ sidered as having been presented at his instance
 “ within the period prescribed by the statute. 1804,
 “ February 24th, Gray against Spens. Morr. App.
 “ No. 14.”

No interlocutor was pronounced declaring the re-
 cord to be closed; but the case having been taken
 up by the First Division of the Court on the 11th
 March, 1826, the following interlocutor was pro-
 nounced:—“ The Lords having advised, &c., dis-
 “ miss the petition and complaint in so far as it is
 “ made by Hugh Arbuckle, and decern, &c.”

Against this judgment the Appeal was presented.

For the Appellants—*Dr. Lushington* and *Mr. W. Adam*.

For the Respondents—*Serjeant Spankie* and *Mr. Alderson*.

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For the Appellant it was contended that a warrant may be implied. *Stair*, B. i. t. 12. s. 12. *Ersk.* B. 3. t. 3. s. 33. L. 18. 53. *Mandat. Stair*, February 23, 1667, L. *Rentoun*, Dict. 9395: and that the rule as to warrants, relates only to foreigners, or natives domiciled abroad. *O'Haggen v. Boyd*, Dict. 4644. *Hope v. Mutter*, Id. 4646. 10th June, 1797. *Ivory Proc.* Vol. 1. p. 163. *Scott v. Gillespie*, *Shaw and Dunlop's Rep.* Vol. 2. p. 165. *Ewing v. Hare*, Id. Vol. 2. p. 534. *Stewart v. Middleton. M'Innes v. M'Coll*, June 13, 1813, F. C. No. 84.

The Respondent's counsel cited the authorities quoted in argument, in the Court below: * and *Fitzherbert*. *Nat. Brev.* 25. 55. *Geo.* 3. c. 184. *Huber*, 657. *Oughton*, *Ordo tit.* 48. p. 81. *Balfour Pract.* 299. *Bankton*, B. 4. tit. 3. §. 25, 26. *Melville v. The Earl of Perth*, Dict. 355. *Earl of Marchmont v. Home*, Id. 358. *Rex v. Cudlipp*, 6 T. R. 503. *Rex v. Trevenen*, 2 B. and A. 339. 479.

The Lord Chancellor.—In the cause in which *Hugh Arbuckle* was Appellant, and *Campbell Innes* and several other persons were the Respondents, the question was whether *Mr. Arbuckle*, who was absent at the time, had given authority for the institution of certain proceedings upon the election, of which he complained and the case having been heard before the first division of the Court of Session, the Court ex-

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* Antè, p. 613.

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pressed their opinion in the following interlocutor. “ Having advised, &c. dismiss the petition and complaint, in so far as it is made by Hugh Arbuckle ; and “ decern, and find him liable in one half of the expenses “ incurred in process, in terms of the statute.” The Judgment expressed in this interlocutor, proceeds upon the opinion of the Court of Session, that it was necessary Mr. Arbuckle should prove that he had given mandatory for the institution of suit.

This case, in my Judgment affords a question of very great importance, in every way of considering it; but in a case of this nature, in which it appears to me that the Court of Session, in all human probability, must understand a matter of practice of this sort better than we can understand it, and there being great inconvenience, either in holding that they are right, or that they are wrong, I cannot form so clear an opinion that they are wrong, as to take upon myself to advise your Lordships to reverse the Judgment. I should, therefore, propose that the Judgment should be affirmed, and that the cause should be sent back to the Court of Session, to proceed as to the matter of James M'Bain, the other party according to the reservation in the interlocutor, as they should be advised. Having stated this, as my Judgment upon this extremely difficult question, and as there are great difficulties in adopting the one or the other view of the case, it does not appear to me, that this is a case in which your Lordships ought to give costs.

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Ordered and adjudged, that the appeal be dismissed, and the interlocutor, so far as complained of, affirmed ; and it is further ordered, that the cause be remitted back to the Court of Session to proceed therein, with respect to the complaint made by James M'Bain, as shall be just.

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An election of Magistrates in a Royal Burgh, which takes place under a warrant from the crown restoring the Burgh, is an annual election within the meaning and provisions of the 7 Geo. 2. c. 16. s. 7, and 16 Geo. 2. c. 11. s. 22.

An action of reduction and declaratur at common law, to set aside the proceedings, may be competent; but it must be brought within the two months prescribed by the statutes.

An appeal will not lie for costs only, where costs are in the discretion of the Court: But where the Court is directed by an Act of Parliament to give costs, it is a proper subject of appeal if they are not given according to the requisition of the Act.

*The Lord Chancellor.**—IF this were a question arising upon the law of England, there would be no doubt about it, for I do not apprehend that a statute which gave a summary complaint, is a statute which would take away the common law remedy, but the case of *Young v. Johnson*,† in the House of Lords, at a date pretty nearly contemporaneous with the statute, appears according to Mr. Wight's note of it, to have decided, as it has been alleged from the bar, that the action of reduction must be brought within two months. Now, I cannot satisfy my mind on what ground it should be held that the action of reduction should be brought within two months, unless the statute related to actions of reduction as well as

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* The facts of the case appear in the opinion delivered by the Lord Chancellor.

† Jan. 1766. Wight, p. 339.

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summary complaints. Considering the nature of the evidence as we find it in the printed cases in the House of Lords, and that there is not a single word that would support the judgment in that evidence unless it was given upon the point, whereas, on the other hand, that point does not appear to have been mentioned in the printed cases, there appears to be something hanging about that case, which makes it look very much like an authority of the House of Lords upon the point. Whether that case which has been so represented as of authority has been well decided, is a matter which I apprehend this House could not trust itself to examine.

This is an action of reduction and declaratur for setting aside the proceedings at an election, which were had in consequence of His Majesty having been pleased to restore the Burgh of Pittenween. It has been very much discussed in the papers as well as at your Lordships' bar, whether this was to be considered as within the meaning of the words of the Act of Parliament, an annual election; whether it was to be considered as a proceeding to be distinguished by majority and minority. Strictly speaking, on looking at the numbers, John Tod, and ten other persons made eleven, and James Tod, and ten others made eleven also, so that you can hardly call it a majority or minority.

But the question is, whether regard being had to the nature of the proceeding this is not within the term, intent, and meaning of the Act of Parliament to which reference has been made; and on the best consideration I can give to the subject, I think that although this was an election held in consequence of His Majesty's restoring the Burgh; and although there was this most unseemly diversity of opinion, and very singular conduct in the proceeding when the

election was had, yet that still it is to be considered as an annual election, and a complaint within the intent and meaning of the statutes.


Then, the question is reduced to this, namely, whether it is competent to bring this species of action, which is an action of reduction and declaratur, after eight weeks or two months have expired since the election, and before the institution of the proceeding. On the one hand, it has been contended, that this is not to be considered as a proceeding under the statutes which regulate the election of councillors and other persons, at these Burgh meetings, but that it is to be considered as an action brought according to the common law of Scotland, and that being an action brought according to the common law of Scotland, there is no statute which ought to be considered as a bar; and I have no hesitation in stating that if we were here to judge of the law of Scotland upon English principles, which we ought never to do, and which I believe we have never intentionally done, that it might be a difficult thing to say, where a special proceeding is provided by Act of Parliament, and without words excluding the general operations of the common law, that that general operation of the common law would be to be considered as taken away; and yet I cannot go the length of saying, that if there are statutes *in pari materia*, you may not infer such a shutting out of the remedy under the common law without any expression in the Act of Parliament which you have to construe.

But I find in this case a difficulty which I apprehend is quite insuperable, because my humble opinion is, that this point has been already determined by your Lordships, and that we cannot now alter it, whatever might have been our opinion upon the question,

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whether this common law jurisdiction was shut out or not, by these special provisions.

The case of *Johnston v. Young*,* has been alluded to, together with the authority of Mr. Wight and Mr. Bell. With respect to the first named of the gentlemen, I think I am old enough to have had the honour of practising along with him at your Lordships' bar; and that he was a very great authority upon these subjects, nobody can deny; nor did I ever hear any dispute, with respect to the correctness of his representation as to matters of law in which he had been concerned. I need not state to your Lordships who Mr. Bell is, because you are all aware that he is a person whose authority is of considerable weight, though still he is a gentleman practising at the bar.

Upon looking at the case of *Johnston v. Young*, I have not been able to find that there is one word in the printed cases upon the subject; and yet it would be extremely difficult, upon looking at the evidence in that case, to conceive how this House could have made the decision which it has, unless the decision that it made went upon a ground that formed no part of the allegations in the printed case, or the evidence; and accordingly Mr. Wight has recorded in his work that the reversal in this case went upon a ground neither mentioned in the Court of Session in Scotland, nor mentioned in the printed cases laid upon your table; that it went upon this ground, that the action of reduction was competent, but still that it must be brought within two months.

It has been supposed that there is some mistake upon that subject, but when we come to look at a subsequent case that is to be found, which has been decided by your Lordships, it appears to me that it is quite impossible to contend with any hope of

* January, 1766, in the Court of Session, D. P.

persuading the House that Mr. Wight is mistaken as to that fact. It was a case which was heard at your bar in the year 1785, in which Robb Miller and others were Appellants, and Thompson and others, magistrates and councillors of the Burgh of Anstruther Wester, were the Respondents. In the printed case, in that proceeding this reason is stated, "Supposing it were competent to the Appellants, though not constituent members of the council of Anstruther Wester, to insist in the present action, yet as the Acts of 7th and 16th of his late Majesty have expressly limited the time for preferring actions or complaints to two months after the election complained of, and the present action was not brought till near twelve months after the election complained of, it is therefore incompetent, and could only have been brought with an intent to create trouble and confusion at the Michaelmas election, which was to come on a few days after the summons was raised, the prevention of which was the principal object of the statutes." Then this reason, which has the signature of Mr. Wight, goes on, and it may be considered, therefore, that this representation was made to this House with respect to what it had done in the case of *Johnston v. Young*.—"This point has been already determined by your Lordships, who reversed a judgment of the Court of Session upon this single ground, and that, though in a case where a complaint of the same election had been brought within two months, but had been dismissed on account of a mistake in the name of one of the Defendants, after which an action of reduction, similar in form to the present, was brought by several constituent members of the council. No objection was taken to the action in the Court below, nor in the cases upon the appeal. The Court of Session reduced the election, but upon this objection

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tion being taken at your Lordships' bar, your Lordships reversed the decision of the Court below without even going into the merits of the case, upon the single ground, that the intention and purpose of the Acts above quoted, was to form a code for the election of magistrates and councillors in Scotland; and while it gave remedies in cases where there was formerly no remedy, it also cured evils which arose from the old laws; and among the other evils the Act intended to remedy, there was no greater than that it was in the power of persons, by bringing actions of declaratur and reduction, to reduce elections made many years before and long after the persons whose elections were complained of, were out of office. This question was very fully entered into by your Lordships, and has ever since been understood to be finally settled," and in that case also the appeal was dismissed.

When we are looking at these statutes, which are all made *in pari materia*, it would be a very singular thing to say, that though the magistrates and councillors are in the form of action required under these statutes to proceed within eight weeks, yet that there is another form of action at common law, in which they need not proceed for eight years, or any given time. I look upon it, therefore, that these cases of *Johnston v. Young*, and *Robb Miller v. Thompson*, decide this point; and I dare not venture to give your Lordships any advice which shall militate against the decision of this House pronounced in those cases.

There is a cross appeal which I feel some difficulty how to deal with. That is about the costs. That those costs should have been given is pretty clear. This House never does entertain an appeal for costs where costs are in the discretion of the Court below; but where the legislature, by a statute, has expressly

required that the Court of Session, in the case of an action which is brought under the authority of that statute, and in the case of a summary complaint which is brought under that statute, shall make the party who fails pay the full costs of suit, it appears to me, that the party is in fact entitled to full costs of suit, and that being so entitled to full costs of suit, the Court below ought, by their judgment, to have given full costs of suit unless they were prepared to say that this was a case out of the statute. If it is a case out of the statute, it would be a question of discretion, and therefore no appeal would lie; but on the other hand, if this is a case within the intent and meaning of the statutes to which I have referred, it appears to me that the costs ought to be given. The great difficulty is to decide in what form we are to give that judgment. Being desirous that we may be quite right, I would propose that I should have the opportunity of seeing the agents before I move your Lordships to proceed to judgment in the precise terms in which it should be entered. I am, however, of opinion, that this judgment ought to be affirmed, and in some way or other this House must take care to provide that the party who has not failed shall have full costs of suit paid to him by the party who has failed.

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Ordered and adjudged, that the interlocutors complained of in the original appeal be affirmed, except in so far as it omits to give costs; and it is declared, that the Respondent ought to have had the costs of proceeding in the Court of Session, according to the true intent and meaning of the statutes relative to proceeding in such cases; and it is further ordered, that the cause be remitted back to the Court of Session, to do therein as shall be just and consistent with this declaration; and it is further ordered, that the said interlocutor, so far as complained of in the cross appeal, be reversed.

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(SCOTLAND.)

Court of Session.

GARDNER and others - - - *Appellants.*REEKIE and others - - - *Respondents.*

In corporate bodies the form of election is of the substance and essence of their constitution. Upon a petition to the Court of Session, against the election of Magistrates for a Royal Burgh; if it should appear that the proper form of Election has not been observed, it is not competent to the judges to sustain the Election, upon the ground that the result is the same as if the form had been observed.

The constitution of a Burgh in Scotland may be altered by a uniform usage of Forty years. *Semb.*

10th March,  
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*The Lord Chancellor.\**—THIS case depends very much upon the question, whether there has been any such usage for any given period of time, as has altered the sett of the Borough, with respect to the mode of carrying on elections. If it depended upon this, that the same persons appeared to be elected in the form in which the election was made, as might have been elected in that form, which if there had not been a usage, would have been the prescribed form, it does not appear to me that the consideration, that the same persons had been elected, would by any means support the election, because I take the form of the election to be of the essence of the election, and more particularly if there are special officers, who are to name indi-

\* See the facts on which the question arises stated, *post*, p. 315, and *seq.*

viduals, out of which individuals a choice is to be made by the general electors. I take it to be a principle of our constitution, and I think the Scotch courts follow the principle, that there is first to be the judgment of particular individuals recommending other individuals and then to be a choice by the electors, in general out of those individuals who are so recommended; and I cannot conceive, at least according to any English doctrine, that if nine individuals are proposed, out of whom the whole body of electors are to chuse, that the mere circumstance that they happen to chuse three, who might be the same individuals, if instead of there being one list of nine, there had been three lists of three, out of each of which lists the general body of electors were bound to chuse one; I do not apprehend that the circumstance of the election falling upon the same individuals, if it could be demonstrated that it would have fallen upon the same individuals in either case, would support an English election; because, if the constitution of a Burgh election is, that the individuals who are to name those respective lists of three, have a duty to give a protection to the proceeding which is to place in the situation of Magistrates the individuals who are to be chosen, the mere accident if there is one list of nine, instead of three lists of three, of the same individuals being recommended, by those who had a duty according to the constitution imposed upon them, of pointing out in the first instance who are the individuals that they think ought to be trusted, those out of whom the choice should be made, is not sufficient: I think the departure from that form which would be considered in our courts as of the essence of the proceeding, if it were challenged, would not stand.

It remains, however, to be examined most carefully.

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and most industriously, whether there be any such usage or not, as that which is said to have varied the sett of the Burgh; because, if the usage does not exist, if there has not been a consistent usage for a certain number of years, (I think the law of Scotland requires forty,) if a usage has not existed which varied the sett of the Burgh, no question arises, and I entertain very considerable doubt upon this whether it has, or has not been too hastily taken for granted that no further proof should be entered into before the decision was made in the court of Scotland. Having just broken this subject, I will proceed, on the second day of causes in the next week, to propose the judgment in this case.

19th March.

*The Lord Chancellor.*—In this case of *Gardner v. Reekie* the question is, whether nine persons should be named from among the Burgesses at large, out of which there were three to be chosen, or whether there should be three lists of three persons, from each of which three lists one individual should be named. After again thinking on the subject I am satisfied upon two points: first, with respect to a usage which is not exactly conformable to the sett of the Borough but which is a mode of qualifying the proceedings in carrying into effect what the sett of the Borough requires, it is necessary to enquire whether there is a clear usage of forty years of delivering three lists of three each; and if that fact could be established, that there was a clear distinct usage of forty years, then the circumstance that in this case it happened that the same individuals probably would have been chosen if there had been three lists of three, as were chosen out of the one list of nine, does not make it a good election; for it is clear that if the three old Baillies were,

according to the usages of the election, each of them to name a list of three, comprehending in each list themselves, and two other persons, and that out of the first of those lists an individual should be chosen, which individual should be one of the Magistrates in the next year, and that out of the second list another individual should be chosen, who should be another Magistrate in the next year; and that out of the third list another individual should be chosen, who should be another Magistrate in the next year,—the constitution of the Borough, so looked at, would authorize us, or indeed require us to say that there was a duty devolving upon the old Magistrates, to take care to name distinct individuals who should be the objects of choice by the Burgesses at large; and their not having exercised that duty will not permit of this answer being given, that the same individuals were chosen as if they had exercised that duty: because in that mode the election could not have that sanction, which under that rule it was intended to have. I come, therefore, to this conclusion, that it is advisable, before you proceed to judgment in this case, to see whether there was before the court of Session clear proof, that such a usage was established. On Friday morning I intend to give my final opinion on this case.

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*The Lord Chancellor.*—In the cause of *Gardner v. Reekie* it became necessary, upon reference to the circumstances of the case, to see the agents on both sides, which I have taken an opportunity of doing.

23rd March.

The question in this case arises upon the election of the Magistrates and town council for the Burgh of Kilkenny in the year 1823. In the sett of the Burgh the form of the election is stated thus: “ first of all the

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Baillies," (of whom there are three) "give in their leet of nine persons, whereof they themselves are always three, out of which they are to choose the three Baillies for the year ensuing, and the treasurer gives in a leet of three persons, whereof he himself is always one; out of which they are to elect the treasurer for the said year, which being read over in presence of the council, and approved of by them, is read publicly in an audience of the Haill Burgesses, who are to vote. This being done, the clerk is appointed to sit in the council-house and mark the votes, there being always one of the council appointed to see his right marking, and accordingly first the Baillies, then the Treasurer,] Council, and thereafter the Haill qualified Burgesses; one by one, give their several votes for the Baillies and Treasurer for the said ensuing year; and the persons chosen by plurality of votes, together with the new council, immediately convene within the council-house, and accept of their respective offices, and give their oaths *de fidei administratione*, the same being tendered to the three Baillies by the clerk, and by them first to the Treasurer, and then to the Council, which being done, they adjourn."

In this case a complaint was made against the election on two grounds: first, that the leet of nine given in by the Baillies, was not subdivided into three leets. Your Lordships will observe that according to the original sett of the Borough, which I have read, the Baillies are stated to give in one leet of nine persons, out of which three Baillies are to be chosen for the year ensuing; but the Complainants insist that instead of a leet of nine being given in, here should be a subdivision into three leets, "the first containing the name of the first Magistrate of the former year, and two other names, from which alone the new first Ma-

gistrate should be elected ; the second containing the name of the second Magistrate of the former year, and two other names, from which alone the new second Magistrate should be elected, the third containing the name of the third Magistrate of the former year, and two other names, from which alone the new third Magistrate should be elected. They alleged that there had been a usage to that effect." This allegation that there had been a usage to that effect, as to the importance of it, depends upon this, whether admitting that the sett of the Burgh in 1710, was of a certain nature, there has been a usage—a uniform usage—such a usage, as would amount to a regulation of the mode of election, from and after the time that that usage took effect by continuance, which would, in the respect I have mentioned, admit of being considered as having become a valid modification of the sett of the Burgh, or a valid alteration of the sett of the Burgh.

There was another ground taken, namely, that the oath against bribery and corruption had not been properly administered. I do not think that it has been successfully contended at the bar, that the case proves any thing like what would be enough, (if any thing could be enough) to set aside the election, and therefore I need not trouble your Lordships any further upon that part of the case.

All that we have heard from the bar with respect to the opinion of the learned Judges, who decided this matter in Scotland, before whom it was brought by petition, is, that they were of opinion that an election which produced the same result by one leet of nine persons, as would have been the result if there had been three leets of three given in according to this modified sett of the Burgh, was not subject to ob-

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jection. Now attending to what is necessary to be done in this case, I cannot think that it would be right to proceed as stated in the Judgment, upon a representation of that kind. I should certainly feel strongly disposed to say, (and I think I am right in that, unless my mind is influenced by English principles more than it ought to be with respect to a Scotch case,) that according to my notion of the matter the identity of the result, if the form of the election has not been right, would not make the form of the election or the election good: because I take the form of the election in these corporate bodies to be of the substance and essence of their constitution: and if the result upon which the choice is made of three persons, out of one leet, might in some cases be exactly the same as the result when the choice is made of three persons, out of three leets, upon reasoning as applied to corporate acts it might be clearly shewn that such might very often not be the case, where the proceeding was in truth upon one leet of nine, instead of being a proceeding by three leets of three: in the one case three individuals recommending each a separate leet, and in the other case three individuals recommending one leet, and not three separate leets. I think it might be so clearly shewn that in many cases the result would not be the same, that at least according to our laws of election, and the way in which we should treat the subject here it would be impossible to say, that the casual identity of the result would render such an election good.

But in order to see whether you can get at that question you must look at another question, and you must look at the effect of the evidence in the cause. I cannot collect, either from what is in the printed papers or from what has been stated at the Bar, that we have

had the opinion of the Court of Session upon the point I am now alluding to. If I must give an opinion I should say, without having been better assisted upon that point, that if there was a clear uniform usage for forty years together, which forms a kind of prescription in the law of Scotland, according to which uniform usage they have proceeded by three leets, composed by three Baillies, instead of proceeding in the old mode of one leet, according to the sett of the Burgh in 1710, that that uniform usage made out distinctly in point of evidence, and shewn by evidence to have existed, might, according to the law of Scotland, either be considered as such a modification of the sett of the Burgh, or such an alteration of the sett of the Burgh, as that it ought to be proceeded upon as the true construction of the sett of 1710, or such an alteration as might be available according to the law of Scotland; but notwithstanding I have said thus much, in the result it is not my intention to prejudice either of the questions of law, upon which I have taken the liberty to say a word or two.

If I understand the course which the case took in the Court of Session in Scotland, it does not appear to me that the Court went so far as to enquire whether there had been such a usage, or to give any judicial opinion upon the question of what would, or what would not be according to the law of Scotland, the effect of such a usage, the Court of Session being of opinion that the result being the same, therefore it was unnecessary to enquire any further. I am afraid that, according to our laws, we can not go on in such a state of the cause; and that it is necessary to do that, which, for various reasons, I have a great objection to doing, I mean to remit this cause back again to the Court of Session, with a direction that they should enquire whe-

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ther there is in this case sufficient proof, or whether, according to their practice, sufficient proof can be given upon a further enquiry by referring it to a Jury, or in whatever other way, that for the period I have mentioned there has been a clear uniform usage to substitute three leets instead of one leet, and that they should enquire what, according to the Scotch law, is the effect of that usage, either in modifying or in altering the sett of the Burgh. If the proof that is given is not sufficient to make out that there has been such a consistent and uniform usage for such a given period (if any given period be sufficient) as would amount to a valid modification of the sett of the Burgh, or an alteration of the sett of the Burgh, then to be sure, if the question is to be decided upon the want of evidence of that usage, that would make it unnecessary to determine the point of law that would arise if there were distinct evidence of such a uniform usage. On the other hand we are not informed here, whether if it should turn upon the question of insufficient evidence, it would be the bounden duty of the Court, according to their practice, to enquire further into the fact of the usage, or the means which they would adopt in order to give themselves the benefit of such further enquiry.

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Ordered, that the cause be remitted to the Court of Session to inquire, whether any and what usage differing from the sett of the Burgh has taken place as to the form or number of the leets and mode of election of the three Baillies of the said Burgh, and for what length of time such usage has prevailed, and whether, having regard to the nature of such usage, (if any shall be found upon such inquiry to have taken place) and the length of time during which it shall be found to have prevailed, such usage ought, according to law, to be considered as modifying or altering the sett of the said Burgh, as to the form or number of the leets and the election of Baillies; and after such consideration and inquiry, to proceed further upon this petition and inquiry as is just.

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## SCOTLAND.

(COURT OF SESSION.)

JOHN DICK - - - - - *Appellant.*JOHN DONALD, (deceased) and, by } *Respondent.*  
Revivor, DONALD CUTHBERTSON }

A., the wife of a bankrupt, her husband being abroad, without the consent of her husband, or a legal ratification by herself, conveys to Trustees under his sequestration, lands of which she was seized to her and her heirs. Upon a sale of these lands by public roup, the vendor by the articles of roup undertakes to execute to the purchaser a valid irredeemable disposition of the subjects as described in his own or constituent's title thereto. He also thereby undertakes to deliver certain specified deeds, &c., which are described as "all the title-deeds of the property in his custody." Upon a suit by the vendor to enforce the payment of the purchase money, and a proceeding for suspension by the vendee; held, on appeal reversing the judgment below, that it is not such a title as a purchaser is bound to accept, and that the title is not limited by the terms of the articles of roup.

THE appeal in this case related to a question of the title to a small property, which was exposed to sale by the Respondent, as trustee on the sequestrated estate of James Corbet, a bankrupt, and was purchased at a public roup by the Appellant.

By the articles of roup, the exposor bound himself to execute and deliver a valid irredeemable disposition of the subjects, as described in his own or constituent's title thereto, upon the usual terms; and

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to deliver to the purchaser the disposition and instrument of sasine thereon in favour of Mrs. Janet Gillies, and the disposition by her in the expositor's favour, with the instrument of sasine thereon, "which are" "all the title deeds of the property in his custody."

Mrs. Janet Gillies was wife of James Corbet. The lands in question had been conveyed by a disposition dated the 14th of April, 1813, to the wife of the bankrupt, Janet Gillies, her heirs, and disponees.

Upon this disposition, she was infeft, and her infeftment was recorded on the 16th of April, 1813.

After the sequestration of the husband, by a disposition reciting that her husband had purchased the land when he was insolvent, Janet Gillies conveyed them to the Respondent.

On the 31st of January, 1817, the Appellant purchased the property, at the price of 1,300*l.*, being the upset price.

The Appellant was bound by the articles of roup, to give bond for the price, but that condition was waved; and it was agreed between the parties that the price should be paid, and the title granted immediately, without entering into the bond. A draft of the disposition was accordingly sent to the Appellant's agent, with the relative title-deeds for the purpose of revisal. Upon perusing these deeds, objections were taken to the title, and the Appellant refused to proceed with the purchase. Upon this the Respondent insisted that the Appellant should find caution, which he refused; and being charged in virtue of letters of Horning at the Respondent's instance to grant bond in terms of the articles of roup, he brought a suspension of that charge.

The reasons of suspension were, *inter alia*, 1st, That the trustee, before he could call for payment of

the price, must produce a legal and valid title to the property, which he had taken upon him to sell: 2d, That the disposition by Mrs. Corbet to the trustee, without the consent of her husband, and without a legal ratification by herself, was not a valid and in defeasible title, but was a deed in itself null and void, and which might at any time be recalled or brought under reduction, by the grantor or her heirs or creditors, or even by her singular successors, to whom she and her husband might afterwards concur, in giving an effectual right to the property.

The Court of Session held that the Respondent was not bound at the expense of the bankrupt estate to make any addition to the title offered by him, but that he was bound at the risk and expense of the Appellant, to concur in any supplementary title which he might wish to have executed.

The appeal was against this decision.\*

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For the Appellant—*Mr. Shadwell* and *Mr. Campbell*.

For the Respondent—*Mr. W. Adam* and *Mr. Abercrombie*.

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For the Appellant, upon the general question the following authorities were cited :—

*Rowan v. Cochrane*, Dict. 14178 : a case where the buyer engaged, by the conditions of roup, to accept a specified title. *Nairne v. Scrimgeour*, Dict. 14169 : a decision that a buyer is not bound to accept warrandice to supply a defective title. *Lockhart v.*

\* Pending the process the Respondent offered to procure an adjudication of the subjects in question, declaring them to belong to the estate of the bankrupt: and he procured a deed executed by the bankrupt confirming the disposition of his wife to Donald, and also a judicial ratification by her upon oath.

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*Johnson*, Dict. 14176: that a purchaser is not bound to complete his purchase where the power of the vendor of tailzied lands was doubtful. *Tait v. Lord Maxwell*, Dict. 14177: that a purchaser of lands under a tailzie not recorded, might suspend the minute of sale.

As to the disposition, by the wife to the husband, the Appellant made two objections, viz. 1st. That it does not bear to be granted with the advice, or by the consent or concurrence of her husband; and 2dly, That it was not ratified by Mrs. Corbet.

Upon this head the following authorities were cited: The *Regiam Majestatem*, "*de pactis utilibus et inutilibus*," where the law is laid down in these words, "*Sunt etiam pacta inutilia, ut in viro et uxore, ubi uxor nihil potest ducere in pactum, sine auctoritate viri sui.*" In the *Quoniam Attachimenta*, it is said, "*Nulla fœmina virum habens potest nec debet, sine viri sui licentia, dare aliquid vel vendere de bonis suis, ultra valorem quatuor denariorum.*" Craig, treating of those "*qui feudum dare possunt*," says; "*At qui liberam rei suæ administrationem non habent, ut nec alienare, ita nec in dare possunt. Nam ubi alienatio rei suæ aliquibus interdicta est, sive à lege, sive à judice, hi nec feuda possunt concedere.*" ITAQUE NUPTA SINE VIRI CONSENSU NON POTEST, neque "*pupillus, omnino, neque prodigus, neque furiosus, neque ullus alius qui vere consensum non habet.*" So Stair, by the same custom of Scotland, the wife is in the power of the husband; and, therefore, first, the husband is tutor and curator to his wife; and, during her minority, no other tutor or curator need to be concerned, or concur to authorize her." Lord Bankton, speaking of the rights and duties of a husband, says; "As to the wife's person, he is her

“ curator ; the wife, though major, being always *sub*  
 “ *cura mariti*, or under coverture ; and, if she was  
 “ minor at the time of her marriage, having other  
 “ curators, their power ceased, and is by law trans-  
 “ ferred to the husband. It is on this ground that  
 “ the wife cannot subscribe deeds *inter vivos*, with-  
 “ out the husband’s concurrence to authorize her, even  
 “ though they respect only her own heritage, to take  
 “ effect after dissolution of the marriage.”

Erskine says ; “ It also proceeds from the curatorial  
 “ power of the husband, that all deeds done or grant-  
 “ ed by a wife, without his consent, are in themselves  
 “ null, though they should relate to her own property,  
 “ and make no encroachment on any right competent  
 “ to the husband. The rule that wives are under the  
 “ curatory of their husbands, is applicable even to  
 “ brides ; for, though a bride be truly *sui juris* while  
 “ she continues unmarried, yet on her actual mar-  
 “ riage, the husband’s curatorial powers draw back to  
 “ the time of proclaiming the banns, after which, the  
 “ bride is disabled from contracting debts, or granting  
 “ deeds, not only to the prejudice of her future hus-  
 “ band, but her own. She cannot, therefore, after  
 “ the proclaiming of the banns is begun, contract any  
 “ debt which will be effectual, either against herself or  
 “ the bridegroom, nor can she dispose of any part of  
 “ her estate by donation, or even as a provision to  
 “ the children of a former marriage without his con-  
 “ sent.” And, speaking of the curatorial powers of  
 the husband, Erskine says ; “ That if the wife should,  
 “ without his consent, make a grant of lands, though  
 “ with the reservation of her husband’s *jus mariti*,  
 “ and the courtesy, the grant would be void, for he  
 “ is her guardian for the security of her and her heirs,  
 “ as well as for himself.”

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It was further argued that the fact (if proved) of the husband being abroad, and his subsequent ratification, did not cure the defect. *Bullions v. Bayne and Hepburn*. Fac. Col. 4th Dec. 1793. *Melville v. Dunbar*, Dict., p. 5993 : that the conveyance, if, as contended, it was virtually a donation to the husband, was gratuitous, and revoked by the subsequent disposition. Ersk. b. i. t. 6. sec. 29. 31; Stair, b. i. t. 4. sec. 18; Ersk. i. t. 6. sec. 32; Bank, i. t. 5. sec. 102. *Scott against Lady Cranstoun*, Dict., p. 6108. That the deed could not be considered a donation by the husband to the wife; because it purports to be purchased with her money. Ersk. b. 3. t. 3. sec. 92; and if so, being a provision, was not revocable; Ersk. b. i. t. 6. sec. 30; or reducible as gratuitous under the act 1621; Ersk. b. 4. t. i. sec. 33.

For the Respondent it was contended that the title was limited by the terms of the articles of roup, and was otherwise unexceptionable. The following authorities were cited: *Currie v. Churnside*, Fac. Coll., 11 July, 1789; Erskine's Inst. b. i. t. 6. sec. 27, 29, and 36. *Dr. Clark v. Lady Sharpe*, Dalrymple, 31 Jan. 1717.

*The Lord Chancellor*. \*—Upon the merits of this case there is no doubt. The Appellant has a right to call for a good and valid title. The question is, whether according to the articles of roup, the purchaser may insist upon a good title. By the mere effect of the contract he is clearly so entitled, unless the right is narrowed by the very terms of the contract. The judges in the court below say, that it is not so good a title as it might be. Some of them admit that it is a doubtful title. One of the judges says, there is no great danger of eviction. The

\* At the end of the Argument.

Lord Justice Clerk says, that the purchaser may insist upon a good title. I can see nothing in the article of roup to take away the right. A valid and irredeemable disposition which the articles undertake to give, must be by some person having the right to dispose. As to the condition with respect to the title deeds, I never heard that, because the vendor provides by the conditions of sale that he will give to the purchaser only certain specified deeds, the purchaser must take a bad title, or such title as appears upon the deeds. If there is any thing special in the transaction between the parties, it may be difficult to give judgment on the case, as it appears in the articles of roup. It may be necessary to look carefully into the papers, and see if there is any ground for objection.

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Ordered and adjudged that so much of the interlocutor of the 11th of March, 1818, as finds that the Respondent is not bound at the expense of the bankrupt's estate, to make any addition to the title offered by him, but that he is bound at the risk and expense of the representor (Appellant), to concur in any supplementary title he may wish to have executed be reversed: And it is declared that the Respondent is bound to make to the representor a good and valid title, and that the title offered to the representor is not such good and valid title, and with this reversal and declaration,—It is ordered that the cause be remitted back to the Court of Session, to review the several interlocutors complained of, and to do therein as is consistent with this reversal and declaration, and the practice of the Court in proceedings of the nature of that in which these interlocutors have been pronounced.

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SCOTLAND.

(COURT OF SESSION)

JOHN WILLIAM HENRY, Earl of St

Sir JOHN DALRYMPLE HAMILT  
 MACGILL, of Cousland, Baron  
 ROBERT DALRYMPLE HORN F  
 PHINSTONE, of Horn and Logie, l  
 quire, ANTHONY GOODEVE, Esqui  
 of Gray's Inn, London, and Jo  
 SMITH, Esquire, Writer to t  
 Signet, Trustees of the late Jo  
 Earl of Stair - - - - -

A., by a trust disposition, directed trustee  
 out the residue of trust funds therein spe  
 and proceeds thereof in purchasing la  
 directed to be settled upon a certain ser  
 deed of tailzie, to which he referred;  
 will directed that the residue of his per  
 invested in government securifies, wh  
 with all the funds, &c., of which he shoul  
 same uses as before provided by the tru  
 The funds having remained uninvested, h  
 cision of the Court be'ow, that after t  
 from the death of the testator, each suc  
 is entitled to the beneficial enjoyment  
 proceeds" of the funds until invested, an  
 not import an intention that the intere  
 accumulate for the benefit of the heir wl  
 intitled at the time when the funds are  
 the trust.

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JOHN, Earl of Stair, by a trust  
 the 18th of December, 1815, di

trustees, who were the Respondents in this appeal, all and sundry lands and heritages, (other than excepting those contained in any deed of entail executed, or that might be executed by him,) and also all and sundry debts and sums of money, heritable and moveable, owing to him in England or in Scotland, or elsewhere, rents of land, goods, gear, and moveable effects whatever, presently pertaining and belonging to him, or that should pertain and belong to him at his death, with all writs relative to the same, (excepting therefrom the furniture in his house at Culhorn,) and that in trust for the uses and purposes after mentioned, and particularly after his debts and legacies were all paid, and a sum set apart for the payment of the annuities, or the same otherwise well secured; he appointed his said trustees and their foresaids to lay out the residue of the trust funds, and interest and proceeds thereof, in purchasing lands in the shires of Wigton, or Ayre, or Stewartry of Kirkcudbright, and at the sight and with the advice and consent of the Lord President of the Court of Session, and of his Majesty's advocate for Scotland for the time being, to annex the same to his entailed estate by taking the rights and securities of the lands so to be purchased, &c., "and under the same conditions, provisions, clauses, irritant and resolute, contained in the disposition and tailzie of his lands of Culquhasen and others, executed by him," and the appointed heirs of tailzie, "and under the conditions aforesaid, and to get the dispositions thereof recorded in the registers of tailzies."

Trustees are then appointed in trust for the uses and purposes contained in the trust deed mentioned, being his sole executors and legatees and intromit-

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ters, with his whole goods and gear, and other moveables, falling under the testament, (with and under the exceptions aforesaid,) and excluding all others from that office.

Besides this trust deed, which was executed according to the forms of the Scotch law, the late Earl of Stair also left a will drawn up in the English form. By that will, which was dated the 5th of June, 1819, after making certain bequests, he gave the rest, residue, and remainder of his personal estate in England, which should not consist of real or government securities, and directed his executors to convert the same into money, and, after payment of his just debts, to invest such money in government securities; and he thereby gave and bequeathed all such stock, together with all such other stocks, funds, and securities, which he might be possessed of at the time of his death, to such uses and for such purposes as he had, in and by a certain deed and writing, prepared according to the Scotch form, executed by him, and bearing date the 18th of December, 1816, declared of and concerning his personal estate, and as to all estates which, at the time of his death should be vested in him upon any trusts whatsoever, or by way of mortgage, he gave, devised, and bequeathed the same to the Respondents in this cause, according to the nature and quality thereof, upon the trusts and subject to the equity of redemption which, at the time of his death, should be subsisting or capable of taking effect therein. By the effect of these instruments, the whole of the property, except the entailed estates of Lord Stair, under any deed executed by him for that purpose was to be laid out in the purchase of lands to the same uses as the entailed estates of Culquhasen.

John, Earl of Stair, died in 1821, leaving the Appellant the first heir of tailzie and provision.

The question which arose in this cause was, with respect to the proceeds of the personal estate, from the time of the death of Lord Stair, until the whole fund should be laid out in the purchase of lands. The property amounted to 200,000*l.* The trustees invested about 120,000*l.* in the purchase of lands; but as they were by the will directed to invest the whole, the question which was raised was, whether the Appellant was not entitled to the interest from the death of the late Earl of Stair, until the trustees had invested the fund in the purchase of land: or whether, under the words of the trust designation, they were to invest the proceeds as well as the capital, in the purchase of land.

This question came first before the House during the time when Lord Gifford acted as Speaker, in the absence of the Lord Chancellor, upon a suit instituted immediately after the death of the testator. The Appellant in that suit, claimed the interest of the fund, from the death of the testator. Upon this claim, the Court of Session, by interlocutor, dated in February, 1823, decided against the claim. In March, 1825, this judgment was affirmed on appeal; Lord Gifford in moving the judgment,\* recommending such affirmance, only upon the ground that the claim was made of interest, from the death of the testator; and that, according to the law of Scotland, a year was allowed to the executors to convert the property and provide for the trusts directed by the will.

In April, 1825, the Appellant brought another action, claiming the interest of the fund from the end of twelve months after the testator's death. In Fe-

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\* D. P. March, 1825. MSS.

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bruary, 1826, the first division of the Court of Session decided against the claim; because the testator had directed "that the whole produce of the estate, both principal and interest accruing thereon, should be laid out in the purchase of lands; and that it was the first attempt made in Scotland, for having any part of the trust estate allotted to the heir in the mean time, under such circumstances; and also because there had been no undue delay on the part of the trustees, in laying out the trust funds as appointed by the testator."

The Appellant having appealed to the House of Lords against this judgment, upon the hearing of this appeal, Lord Gifford, considering the case as one of very great importance in the law of Scotland, and as it did not appear to him that there were decisions in the law of Scotland ruling the point, moved the House to remit the case to the division of the Court of Session, from which it came for the purpose of their taking the opinion of the Lords of the other division. An order to this effect was accordingly made by the House, in May, 1826.\*

Upon this remit, with the exception of Lord Eldon and Lord Alloway, the Lords of the two divisions were of opinion, and by interlocutor, dated in March, 1827, decided that the whole interest and proceeds of the fund, were to be laid out in the purchase of lands, and that until the lands were purchased, the Appellant was not entitled under the trust disposition, to any part of the interest or proceeds.

Against this decision the appeal in this case was presented.

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\* MSS. D. P. May, 1826.

For the Appellant—*Serjeant Spankie* and *Mr. Keay*.

For the Respondents—*Mr. Shadwell* and *Mr. Miller*.

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*The Earl of Eldon*.\*—I propose to proceed on Monday to give judgment in this case. If any of your Lordships have formed opinions already upon the case, yet upon looking back to what was stated by the late Deputy Speaker, Lord Gifford, and looking to the opinions that have been expressed by all the learned Judges, in Scotland, it seems to me that, from a regard to the proper consideration that belongs to such a case, your Lordships should at least take some short time to consider of it before you finally decide. Personally, I am desirous of a short interval; because it is quite impossible I think, in giving judgment in this case, not to refer in some measure to some of those decisions which were pronounced by me when I had the honour of holding the Great Seal in the Court of Chancery;—not for the purpose of doing what I must ever protest I have been most anxious to avoid, namely, determining that any case which belongs to the law of Scotland should be affected, because we have adopted a rule, or have adopted a particular mode of administering the law in England; but for the purpose of considering what were the real principles of those cases, and whether, regard being had to the law of Scotland, they will or will not authorize us to say, that, according to the law of Scotland, this demand can be sustained. It is for that reason that I should rather wish that the opinion of the noble and learned Lord† who is now in the House attending the hearing of this cause, should be

\* Upon the conclusion of the argument.

† Lord Redesdale.

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given, before I address your Lordships on the subject; because I may possibly have some impression which his observations may correct. In my opinions, I keep in view the distinction between what is the law of England, and what is the law of Scotland; because I apprehend this case must be decided, not according to the law of England, but according to the law of Scotland. Still, the question will result to this, whether in this particular case, if it were an English will, instead of being a Scotch will, the rule of the law of England will not be the same as the rule of the law of Scotland; and whether the converse of that is not true, that the rule of the law of Scotland is the same as the rule of the law of England, and whether this view may not be taken, not for the purpose of adopting the rule of the law of England, but the rule of the law of Scotland. On these grounds I trust your Lordships will not think it inconvenient that the judgment on this cause should be postponed to the sitting of this House on Monday morning.

*Lord Redesdale.*—I have viewed this case as important in point of principle, for this reason, because, in the argument at the bar, it has been conceived on the part of the Respondents, that there was some inclination to make that which was the rule, adopted by a Court of Equity in England, the rule of the law of Scotland. Now, I apprehend, that this case is to be decided simply upon the intent of Lord Stair, expressed in the instrument which he had executed. That instrument is to be construed so as to carry into effect the principal intent, and the intent is not to be inferred from that which he has not clearly expressed. The doubt which I have upon my mind, particularly upon this subject, is, whether the judges of the Court in Scotland have not added words to

this will; which are not in the will; whether they have not to the words "interest and proceeds," added the words "until an investment shall have been made;" it appears to me that in the construction they have given to this will, they have added those words. I have found it difficult, viewing the will, to conceive how that addition can be made to those words. If they are so strongly expressed that it is impossible to give them a different interpretation, to that I must submit, but I cannot find any thing from which I can collect such an intention on the part of the testator. There is another part which I think has been very much overlooked, if I may use the expression, in what has fallen from the learned judges who decided the case in Scotland. I conceive they have overlooked that which I should have thought the clear rule of the law of Scotland, in construing a disposition of this description, namely, that they are to look to the main intent of the person making the disposition. The main intent appears to be in the view I have taken of it, (subject of course to further consideration,) that his personal estate should be applied for the purpose of creating a property that should go in succession to the several heirs of entail, of a particular estate which he describes, and he means that all his lands, exclusive of entailed estates, should go in the same way. Now it appears to me, therefore, that the will should be construed according to the law of Scotland, as laid down by Lord Stair, the disponent. It is meant for the equal benefit of all the several heirs of entail, and not the preference of one to another.

I have also called to mind circumstances which have occurred in other cases; for instance, that relating to the late Duke of Queensberry's property. . . The late Duke of Queensberry's property was in litigation for

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a greater number of years than this; he had made a similar disposition with that which is made in this case. The principal object in that disposition, the creating a settlement of lands to go with his entailed estates, according to the doctrine of this case, would, during all that period of time necessarily have been defeated. Now I think that, in construing a will, you must consider those subjects as operating to defeat the principal intention, which are wholly out of the control of the testator himself, and which he does not mean should control his disposition, and upon that ground therefore it seems to me, that I must look, in judging of this instrument, to what was the main intent of Lord Stair. The main intent of Lord Stair seems to me to have been, to convert his personal estate, and any lands which he should have, and which were not subject to a particular entail, into lands to be settled upon the same heirs of entail who were included in the disposition which had been made of the particular lands to which he refers: now that intent cannot be carried into execution in the manner in which this instrument appears to me to have been construed in the Court below:—that is a difficulty which strikes my mind; I should certainly wish to give more consideration to that subject, and more especially as the Courts in Scotland appear, with the exception of two of the judges, to have been of a different opinion.


I believe that it is as much the law of Scotland as of every other country, that, in construing a disposition of this description, you are to look to the main intent of the person who makes such a disposition, and that you are not to look at the particular words and expressions, unless they are clear, plain, and explicit, or that you cannot give them another construction. As to the words “interest and proceeds,” it

appears to me that unless you add words not in the will, they cannot have the construction attempted to be given by the Courts in Scotland. Under these circumstances I shall certainly consider this case until Monday next, and on Monday I should wish more at large to give my opinion upon the subject.

Although my noble friend may think it necessary to advert to the cases which have been decided, and particularly those decided by himself in the Courts in England, I shall lay those cases wholly out of my consideration, and I shall do so for this reason, that it may be understood, whatever opinion I may form upon the subject, that it is not guided at all by those decisions—I mean any otherwise than as I would guide my decision in this case, by reference to a decision in any foreign Court of justice. In the decision of all cases, we frequently refer to what are the opinions of judges. To the decisions in the Roman law, the Courts of Scotland pay great deference in the rules which they lay down: For what reason is that? It is, because they conceive that what has been the judgment of persons of considerable learning and discretion in other countries, is a very good ground for guiding the decision in a country where there is not a positive rule laid down upon the case. If there had been here a positive rule in the law of Scotland, laid down upon the subject, to that it would be the duty of this House to defer; but where there is no such positive rule, and you are to decide entirely upon the circumstances of the particular case, then I conceive the use that can be made of decisions of that description, is entirely to guide our own discretion, not as decisions, but as the opinions of learned men upon the particular subject. Under this impression I wish to give the subject fur-

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ther consideration; my present opinion upon the subject is, that there has been a mistake in construing the intent of Lord Stair, which is to be collected from the disposition he has made.

June 18th.

*Lord Redesdale.*—The question in this case is upon the proper construction of this instrument, and it appears to me that the Lords of Session in Scotland have mistaken the meaning of the disposition of the late Lord Stair. They have supposed that Lord Gifford acted upon an analogy between dispositions of this kind in England and dispositions of this kind in Scotland, and they seem to think that it was a sort of attempt to make what they call the Scotch law conformable to the law of England. It seems to me that they have totally mistaken the subject; the question is not a question of law, the question is a question of intent. What was the intent of the late Earl of Stair? The late Earl of Stair has unquestionably used these words:—that he gave “all his personal property, after his debts and legacies are all paid, and a sum set apart for payment of the annuities, or the same were otherwise well secured, appointing his trustees to lay out the residue of the trust funds, and interest and proceeds thereof in purchasing lands.” But the interest and proceeds are not expressed definitely. They are words which are very properly thrown in as necessary to include whatever interest or proceeds shall be due to him at the time of his death, and whatever interest and proceeds shall accrue (in the same way as in this country we have similar dispositions) during the period allowed to the executors to collect the effects. According to the law of England twelve months are allowed for that purpose. According to

the law of Scotland twelve months are allowed for the same purpose. No person has a right to claim against the executors of a testator before the end of a twelvemonth. Six months for the collection of the debts, and six months for the distribution of them, according to the disposition of the testator: that time is allowed by the law of Scotland.

It appears to me that the true construction of this instrument is this, to give all the personal estate to the persons who shall from time to time be entitled to the lands; it is a gift to them—a gift through the medium of a trust, but a gift to them; and it would be absurd to suppose that he did not mean it equally to them. If the construction which has been contended for by the trustees in Scotland were to take effect, the consequence would be, that there would be an inequality; for if it should so happen (which might very well happen) that the personal estate, through debts and mortgages, and so on, could not be all collected for the course of twenty or thirty years, the present Lord Stair, and two or three other persons succeeding to the estate, might have no enjoyment of the bequest whatever, but on the contrary, the fund would be augmenting for the benefit of the successors. It appears to me perfectly clear, that the intent of this testator was an equal benefit to all the persons who should succeed each other in the heritages and lands taken under the deed of entail; and although this is through the medium of a trust, it is in effect a disposition for their benefit, and it strikes me that that is the mistake which has been made by the Court of Scotland. Some of the learned Judges appear to be of opinion, and they have in truth considered the words “interest and proceeds” introduced in this disposition, as constituting no interest

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and proceeds, but, until lands shall be purchased, as part of the substance of the gift. Now I apprehend the meaning of those words is simply this—the interest and proceeds which shall not have been received at the time of the testator's death, and the interest and proceeds which shall accrue until the ordinary time of the disposition of the personal estate. If the words had been added, “until the money shall be laid out in the purchase of lands,” then undoubtedly that might have been the construction, but there are no such words, and I do not conceive that there is any ground for inferring that it was the intention of the noble Lord to give to his will a construction as if it contained those words, those words not being to be found there.


It strikes me, that even in the argument on the part of the Respondents, and of the learned Judges in Scotland, they really do introduce those words into the will which are not there, and that they have founded their decision upon that opinion.

You will be pleased to recollect some of the circumstances which happen in the disposition of trust property, in order to see to what extent this will go. Suppose this had happened in the case of the Duke of Queensberry, where for twenty years together his whole property was subject to such claims that the executors could not execute his will, would that circumstance alter the intent of the testator? would it make the disposition different from that which it would have been if that circumstance had not occurred? So, suppose this trust disposition or will had been disputed, as was the case in the instance of Lord Fife. Suppose the question to be, whether this disposition could or could not take effect, a considerable time might be employed in litigation. You

will observe, this extends to all and sundry lands of inheritance, except those contained in the deed of entail, so that it applies to all his lands of inheritance as well as the rest of the property. I take it, that whatever is not within the power and control of the testator is not to be conceived to be within his mind and meaning. It is important to consider within what time he might expect this to be concluded; there might be debts claimed by persons to whom they were not due—there might be mortgages, and it might be necessary for his executors in England to proceed to foreclose the mortgages; they might have to sell the mortgages. Under such circumstances, that which they had to perform might have occupied a considerable length of time before the will could be executed, and in the mean time the persons designated as the object of the testator's bounty might not have the benefit of the disposition at all. In this very case part of the property given is lands, but if those lands are not in the particular counties that he mentions, I apprehend those lands must be sold, and the price of them laid out in the purchase of lands in other counties; that conversion of property it might require a considerable time to execute, and it is impossible to conceive that Lord Stair, when he made this disposition, meant to make the favour which he intended to give to his immediate successor, so very different from that which would be given to future successors which must happen if the construction put upon this disposition by the Court of Session were to prevail.

Under this impression, it has struck me that the proper manner of disposing of this case would be simply to declare your opinion upon the subject, and to refer it back with that expression of opinion to

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the Court of Session. I think that will be the best way, because, having declared your opinion upon the subject, the Court of Session will be then able to execute the intention in such manner as to prevent any mistake on the part of your Lordships. I have always thought that, when dealing with the law of Scotland, where you are not so perfectly well acquainted with all the forms and the little difficulties which occur in the execution of a decree, it is best, generally speaking, only to declare your opinion upon the subject, and to leave the execution of that opinion to the Court below; and feeling this to be the proper mode of proceeding, I would propose to your Lordships so to declare.\*

This litigation has arisen upon a question not properly respecting the capital of the estate, but respecting the interim profits, and therefore it appears to me referring to the words of the will, in which he appoints factors, and trustees, and persons to collect the effects, &c. that it was his intention that whatever expences occurred with respect to the produce of his property whilst in the hands of trustees, should be paid out of that produce. If a fund is set apart to answer the annuities, that fund cannot be laid out in the purchase of land until the annuities are determined. Now your Lordships will perceive the lands at Bellhaven were to be settled according to the entail; the lands at Bellhaven, therefore, could not be charged with these annuities; they were not within the provisions of the entail, nor could the lands to be purchased be charged with them. It appears to me, therefore, obvious that these words interpret, (if there was any necessity for interpretation,) what was the intention of Lord Stair;

\* Here the noble Lord read the minutes which he proposed as the subject of the Order. (See the end of the case.)

that he meant the whole property should go from the time when, according to the law of Scotland, the effects would be considered as collected to the same uses to which he had given the estate of Bellhaven by his will. Under these circumstances, therefore, I would present this\* to your Lordships as the proper finding in this cause.

*The Earl of Eldon.*—I agree with the learned Lord in the propositions which he has stated, and particularly in the propriety of remitting this case back to the Court of Session in Scotland, because the execution of the trust must be carried forward in the Court of Session in Scotland. Having, in Scotch causes, been in practice as a counsel at your Lordships' bar, and in judicial proceedings in this House, having been concerned for upwards of forty years; I must take the liberty now of saying (and I shall never have occasion, perhaps, to repeat it) that it has always been an acknowledged maxim in this House, that you are not to make the laws of Scotland in your decisions and by your judicial proceedings similar to the laws of England. That is a purpose which can be accomplished only by legislation. It is not to be attempted in the distribution of justice. You are to decide here as if you were sitting in the Court of Session in Scotland; and I beg your Lordships to attend to what I have now stated, because it is quite obvious that an opinion has been entertained elsewhere that we are proceeding on a different principle. We have never proceeded on a different principle in the long period to which I have been now adverting. At the same time it is idle to deny that it is extremely possible that a person whose mind is constantly

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\* The noble Lord here presented the proposed Order.

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intent upon what is the law of England, may sometimes feel that mind more influenced by considerations arising out of the law of England than if he were a pure Scotch lawyer, sitting in the Court of Session in Scotland: but I can take upon myself to say for Lord Thurlow, Lord Rosslyn, and myself, that as far as, consistently with human infirmity, we were enabled to guard ourselves against being misled from that influence which our early occupations might introduce into our minds, to the utmost extent we have endeavoured to avoid it; and I therefore preface the few words I have to state, with professing my entire concurrence with that which is expressed by Lord Alway and Lord Eldin, (both great authorities in Scotch law,) that, "with regard to the English cases so much founded on by the parties, they are not authorities sufficient to warrant the proceedings of that Court, which must be directed by their own laws and by their own rules." This is therefore a case that must be decided according to the law of Scotland.

On the other hand, there can be no manner of doubt that, in considering what the law of Scotland is to be in a case where we have not before us any decision in the law of Scotland which forms a precedent by which we ought to be governed, it is perfectly competent for us to obtain what assistance we can derive in forming a proper judgment by looking at the law of England; not by transfusing the law of England into that of Scotland, but to see how far those principles, which are applicable to every law, and capable of application in the law of every country, can be or not made serviceable for the decision of a case which stands before you for determination. We have not many cases, at least I am not aware of many cases which have been decided in the

law of England proceeding from courts of equity and courts of law—not many cases upon this question. I think one of the first is that strong case before Lord Thurlow, of *Hutchin v. Mannington*,\* which was a case in which a person, if I recollect the circumstances accurately, had died possessed of a very considerable personal property at Bath, and had left considerable sums to different individuals, with a direction that those sums were to go over to others in case those individuals died before they were received. Lord Thurlow was of opinion, and whether the principle is accurately or inaccurately applied in the particular case, is a question that must be submitted to the mind of the man who is considering whether that principle is properly applied or not; but Lord Thurlow was of opinion that there was a rule of law, which rule of law has been applied through all the subsequent cases, namely, that you are not to look at a particular intention of the testator particularly expressed, with a view to carry that into execution, if you find that the primary and principal intention of the testator, declared by the same instrument, must be disappointed by carrying into effect that particular intention, that a different rule would lead to the laying aside all attention whatever to that which was the primary purpose of the testator. Lord Thurlow was therefore of opinion that as it was utterly impossible to inquire how far all the different sums which were to constitute the different legacies given to particular persons, could or could not, with reasonable diligence, have been remitted from a distant country and actually received; it was competent to him, to look into the whole of that instrument, and not laying it down

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\* 1 Ves. J. 366. 4 B. C. C. 491, note.

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as a rule of equity, but laying it down as a principle on which he could act, to guide himself by what he satisfied himself was the intention of the testator. That was a strong decision, undoubtedly ; but he was of opinion that he must sacrifice one intention of the testator or the other, and he thought he was justified in sacrificing that which required the money to be received, to that general intention of the testator, that the persons who were the objects of his bounty should enjoy the benefit of that bounty.


Then came the case of *Sitwell v. Bernard*,\* as to which I should be extremely sorry to think that I was wrong, because I never certainly in the whole course of my judicial life took more pains to be right than I did in that case. In subsequent cases, in the case† of Mr. Angerstein's will, I had an opportunity of stating that it was not my opinion that there was a general rule, which, let the will be what it might in its terms and its expressions, must be acted upon by a court of justice ; but that you are to look to the whole, as Lord Kenyon expressed it, to look to every thing within the four corners of the will, and to see what was the intent of the testator on any point, with respect to which you would be justified in thinking he was not anxious it should be carried into execution. I thought that the will in that case entitled the individual to the interest before the money was laid out, and I cannot in the least agree to the proposition which has been stated in the opinions of high and learned Judges in this case, that the mere object of this testator was to annex this property to the title of Stair ; my opinion upon that question being that this tes-

\* 6 Ves. 520.

† *Angerstein v. Martin*, 1 Turn. 232. See also *Hewitt v. Morris*, id. 241.

tator's primary intent was that all who were to succeed to that title should, as it is to be collected from the text and language of the will, take a benefit under that will; that looking not to a particular intent, but to the leading intent, it appears that he was anxious that each and every of the heirs in succession should have their proportion of the enjoyment of that fund which, as it appears to me, was meant to be a fund to be enjoyed for the benefit of all of them.

Then, the question here is, what was the particular intent of this testator, and what was his general intent. When you see a general intent, I apprehend that will authorize you to say that although there is a particular intent expressed in particular words which may have a more or less extensive meaning, and where the general intent cannot be carried into execution unless you give those particular words a limited meaning, according to all cases in English law and in Scotch law, in all law relating to the construction of wills, you must give that construction which, upon the whole, best and most effectually carries into execution that which was the primary intent of the testator; and I cannot bring myself to think, because the words "interest and proceeds" are in this will, there not being according to what we find very frequently in wills and in deeds—a particular direction that where money is laid out in land, all the interest that shall accrue upon that money shall also be laid out; there not being to be found on the other hand, that which is very common in wills of this description, particular clauses that until the money is laid out the interest shall be enjoyed as the rents and profits would be enjoyed if the money was laid out in land; but that the question here is, whether it being the clear intent of this testator to give a beneficial interest to

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every one who was to succeed to his real property purchased in those counties in which he directed the purchase to be made: these words, "interest and proceeds" may not be satisfied by a much more limited construction of them than that construction which would make them mean interest and proceeds as they accrue, and may be received until the money shall be so laid out; so that though this should happen to be a title which is to last for ever, if we were to apply such a principle to money to be laid out in lands, the subject of inheritance, as other lands are in Scotland, it might turn out that no one person to whom the benefit of that devise was intended might enjoy any part of that benefit but the ultimate remainder-man.

It is therefore, I apprehend, not upon any purpose of your Lordships of applying this general rule which has been laid down in the Courts of Equity here, that you are now called upon to reverse, in effect by expressing your opinion, this determination of the Court of Session in Scotland; but you are called upon to do so, because, at least, according to my view of the case, you are thereby effectuating what upon the legal and best construction of this will is the authorized construction of this will; authorized I mean by the principles on which you are authorized to construe all wills. Upon the authorized construction of this will you are determining that that benefit shall be given to Lord Stair which you think it consistent with the true intent and meaning of this will should be given to him.

Upon these grounds, therefore, it is that I perfectly agree in the general purpose expressed in the proposition stated by my noble friend. I am also of opinion that as the late Lord Stair has created this question himself by the manner in which he has ex-

pressed himself respecting this purchase and this interest, the expense of deciding this question must fall upon the fund with reference to which the question has arisen.

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This House is of opinion that, according to the true construction of the trust disposition in question, the same ought to be considered as containing a gift of all and sundry lands and heritages of John, late Earl of Stair, other than and except those contained in any deed of entail executed by him, and also all and sundry debts and sums of money, heritable and moveable, owing to him in England or in Scotland, and elsewhere, rents of land, goods, gear, and moveable effects whatever presently pertaining and belonging to him, or that should pertain and belong to him at his death, excepting the furniture in his house at Culhorn, together with the interest and proceeds of such several funds after mentioned to the Appellant, and the several persons who may become entitled in succession to the lands of Culquhasen and others, by virtue of the disposition and tailzie of the said lands of Culquhasen and others, according to the several rights and interests of the Appellant, and of such several persons successively in the said lands of Culquhasen and others, by virtue of such entail, subject nevertheless to the costs and expenses of the execution of the trusts of the trust-disposition in question, except the particular costs and expenses after mentioned, and also subject to the payment of the several legacies and annuities in the said trust-disposition mentioned: And this House is therefore of opinion that the Appellant was and is entitled, and that the several persons who shall from time to time succeed him in the entail of the said lands of Culquhasen and others, according to the course of such entail, will be from time to time entitled to the interest and proceeds of the whole of the trust funds which have arisen from the end of the twelvemonth usually allowed, according to the course of the law of Scotland, for payment of the debts and legacies, and which shall arise until the whole of the capital of the said trust funds with the interest and proceeds thereof, which have accrued prior to the expiration of the twelvemonth shall have been applied in the purchase of lands according to the directions contained in the trust-disposition, after deducting out of such capital, and out of the interest and proceeds accrued prior to the expiration of such

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twelve months, all costs and expenses attending the execution of the trusts declared by this trust-disposition, except the costs and expenses attending the collection and application of such interest and proceeds which have accrued, and which shall accrue after the expiration of such twelve months, which last-mentioned costs and expenses this House is of opinion ought to be deducted out of such interest and proceeds only; and this House is therefore of opinion that the costs of all parties to this suit, including the costs of this appeal, in as much as the same particularly concern the question respecting the right to such interest and proceeds, ought to be paid out of such interest and proceeds, as part of the costs of the application thereof; and this House is of opinion that according to the directions contained in the said trust-disposition, the annuities thereby given ought to be secured by the appropriation of a sufficient part of the capital of the said trust funds; that funds should be set apart to answer those annuities, and that the funds which shall be appropriated for such purpose ought from time to time, as such annuities shall respectively cease and be determined, to be applied in the purchase of lands as part of the capital of the said trust funds, and that the interest and proceeds of the funds which shall be so appropriated after payment of such annuities respectively, but subject thereto, ought to be paid from time to time as the same shall accrue to the Appellant, and to such other person and persons as shall from time to time succeed to the Appellant under the entail aforesaid, as part of the interest and proceeds of the capital directed to be applied in the purchase of lands as aforesaid: And it is therefore ordered that the cause be remitted back to the Court of Session to review all the several interlocutors pronounced in this cause, and to make such orders respecting the same, and in execution of the trusts aforesaid, as shall be consistent with the opinions so declared by this House, and as shall be just.

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A., being a younger child, becomes entitled, upon the death of her father, by his appointment under a marriage settlement, to — *l.*, as a portion charged on lands, and to 1,500*l.* under his will, charging only his personalty. The other younger children become entitled to similar portions and bequests. The widow was entitled to a jointure under the settlement, and plate and household furniture under the will; B. (as eldest son,) enters upon the estate, under the limitations of the settlement, and being in possession, carries on a correspondence on the subject of an increase of the jointure of the widow, and the portions of the younger children with W., a common friend of the family, acting as the agent of B., as well as the widow and younger children. In the course of this correspondence, he proposes by letter, on certain conditions, to increase the portions of his brothers and sister, and the jointure of his mother, and gives directions to one of his brothers to pay the increased jointure, and the interest upon the increased portions, which is done accordingly. After the interest had been paid for one year, a treaty of marriage was commenced between A. and C., who applied to the common friend to ascertain the amount of A.'s fortune, and was informed by him of the correspondence with B., and that he had authority to state, that 4,000*l.* was the amount of A.'s portion, to be secured on B.'s estate. Upon the faith of this communication, A. and C. intermarried. The interest upon the increased portion

was paid by the agent of B. to A. and C., for three years after the marriage. B., in the mean time, had possessed, in consequence of the correspondence, part of the personalty which belonged to the widow and younger children under the will; and had received without objection, accounts from his agent, including the allowances paid to the widow, and the younger children, by way of interest upon the increased portions.

Upon a bill by A. and C., to enforce the payment of the increased portion, to which the widow and the other younger children were Defendants, and by their answers submitted to perform the conditions on which the increase of portion and jointure was proposed: Held, that the effect of the correspondence, with all the circumstances of the case, amounted to an agreement which a Court of Equity ought to enforce.

In the letter on which the husband and wife relied, as the agreement in consideration of marriage, B. says,—“I can never be reconciled to the marriage, &c.” Then he proceeds to speak of the arrangement between him and his family, and repeats his part of the agreement as to the younger children;—“4,000*l.* each, to be secured on certain lands; my sister’s to be secured to herself for life; then among her children, &c.” After stating the conditions for this increase of portion, he concludes:—“This, I think, is an abstract of the agreement, and, when put into the form of a deed, if assented to by them, I am ready to execute at any time.” And he adds:—“I will not entangle myself with Mr. J. R. (the husband). If this match goes on, I will neither meddle nor make with it or their settlements.”

Whether such a letter written before the marriage, to W., the common friend, and in the circumstances before mentioned, could be enforced as an agreement in consideration of marriage. *Quære.* — *Montgomery v. Reilly and others* - - - - - p. 364

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## CHARITY :

1. A, having purchased an ancient chapel, with a parcel of ground adjoining, devises it by will, dated in 1590, together with certain messuages, &c., in trust, to complete the building of certain alms-houses, which he had commenced on the ground near the chapel, and to apply the rents of the messuages, &c., to the support of four poor people, with directions for keeping up the chapel, and appointing a minister, chiefly for the benefit of the alms-houses; but partly also for any other persons who might think fit to attend the service. In 1769, the chapel having fallen into decay, is conveyed, together with the piece of ground, the alms-houses and the messuages, &c. by the heir of the surviving trustee, to the Corporation of Ludlow, who, in 1771, pull down the chapel, convert the materials to other purposes, and grant leases of the piece of ground, near the chapel, upon which houses are built.

Held, (reversing the decision of the inferior Court,) that this is not a case within the jurisdiction of the Court under the enactments of the 52 Geo. 3. c. 101.

The operation of the act is confined to the simple cases of a clear breach of trust.

In cases of breach of trust, Courts of Equity may decree an account of all the profits made; but (semb.) they cannot award damages, (*i. e.*) compensation for damage done to the trust property.

The Attorney-General having signed and allowed a petition under the act, is at liberty to appear for the Respondents, to argue their case.

A person cannot present or join in a petition, although he may have an interest in the question, unless he was (or represents) a party in the matter in the Court below.

There cannot be a prospective order to pay costs as of proceedings to be had before the Master. The question as to such costs ought always to be reserved.—*Corporation of Ludlow v. Greenhouse and others* - - p. 17

2. The Corporation of Dublin having before the year 1777, supplied water to the inhabitants of the city, from works which they had constructed, but the rents which they received being inadequate to the maintenance of the water-works, by the Irish Act 15th and 16th Geo. 3, the owners of occupiers of houses were compelled to provide branch

pipes from the mains of the company to the houses, and the corporation were empowered to charge the owners or occupiers with certain fixed annual rates or rents, in order to construct new mains and extend their works; to borrow money for those purposes, and to mortgage the rates for the repayment of the money so borrowed.

Under the authority of this Act, the corporation from time to time borrowed on the credit of the water rents, various sums of money, which, in 1809, amounted to 67,800/.

In that year the corporation obtained a new Act of Parliament (49th Geo. 3), by which they were empowered to borrow, at stated annual periods, a further sum amounting to 92,200/., and to charge the debt upon the rates granted by that, and the former Acts. The Act further required that the interest of the money borrowed under that Act, should be retained out of the rates thereby granted, as well as a further sum of 2,000/., to be appropriated as a sinking fund to pay off the whole debt for money borrowed under that and the former Acts. The Act further directed that distinct accounts should be kept of the rates received under the Act, and that the surplus, after providing for the interest of the whole debt, should be applied in laying down iron or metal main and service pipes, in the general improvement and extension of the water-works, and to increase the sinking fund; and it was declared that the rates being granted only for such purposes, should not be subject to deductions, except for collection, nor be deemed rates for the supply of water as for sale.

The Act then provided that the corporation should furnish annually, to be laid before Parliament, an account of the sums received by them, under that and the former Acts, and of the manner in which the same had been expended and applied. Finally, a further provision was made by the Act for the appropriation to the sinking fund of any further surplus out of the rates.

In 1823, an information and bill was filed on behalf of the inhabitants of Dublin paying water rates, against the corporation, which stating various acts of mismanagement and misappropriation of the funds arising from the rates; submitting that the corporation were trustees under the Act of the rates thereby given, for uses which were charitable in their nature, and charging that the conduct of the cor-

poration amounted to a breach of trust, prayed (among other things) a declaration and execution of the trust, and that accounts might be taken of the rates received by the corporation, and the application thereof; of the sums annually applied to the sinking fund; of the money borrowed and due on the credit of the rates, and which had been applied in payment of the principal and interest of the debt.

To this information and bill, the Defendants put in an answer, by which, after admitting many of the principal facts, and setting forth various accounts, they submitted that they were not trustees, that the purposes specified in the Acts were not charitable uses, that the Act required the accounts to be furnished annually to the lord lieutenant to be laid before Parliament; which having been done, it was a bar to the jurisdiction of the Court, of which matter they prayed the same benefit as if they had pleaded to the bill.

Held, (reversing the judgment in the Court below) that the Court had jurisdiction to entertain the information and bill.

In what particular form a corporation shall account, and to what extent they shall be made responsible upon a breach of trust, *quære*.

The question as to interest, whether simple or compound, at what rate and from what times to be charged upon monies which ought, according to the trust, to have been applied or reserved at given periods, is a matter to be reserved for further directions.—*Attorney General v.*

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**DONATIO MORTIS CAUSA :**

E., having by his will made a certain provision for his daughter, an only child—with whom he had been offended, on account of a clandestine marriage, (but was reconciled to her and her husband,) declared to a common friend his purpose to make a farther provision for his daughter. Being on his death-bed and unable to write, he was urged by that friend to make a gift to his daughter of certain monies, secured by mortgage and bond, and expressly assented to that proposal. In the evening of the same day, being then unable to speak, he was reminded by the same friend of the transaction of the morning, and the deeds of mortgage and bond securing the monies being produced, he was informed that it was necessary to confirm the gift by a delivery of the deeds; and the friend proposed, with the father's permission, to hand over the deeds to his daughter. Upon this proposal the father made an inclination of his head, and the friend then handed the deeds across the bed, where the father was lying, to the daughter on the opposite side: whereupon the father placed the hand of the daughter upon the deeds and pressed it with his own hand for some minutes, and appeared satisfied with what he had done. The deeds in question consisted of, 1. A conveyance in fee of lands to secure 2,927*l.*, with the usual covenant for payment of the money lent, and a bond by way of collateral security. 2. An assignment of a mortgage debt of 30,000*l.*, and of a judgment for that sum, recovered on a bond, with a conveyance of the land, and the usual covenant for payment of the money.

Held that this was a valid *donatio mortis causa*; that the property in the deeds, and the right to recover the money secured by them, passed by the delivery followed by the death of the donor, and that the real and personal representatives of the donor were trustees for the donee, to make the gift effectual.—*Duffield v. Elwes* . p. 497.

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**EXECUTOR :**

E., being tenant for life under a deed of settlement with a power to lease, under certain restrictions, grants leases not in conformity with the power, and dies, leaving by will the residue of his personalty to J. E., his son, the next remainder-man under the settlement.

J. E., having called upon the executors to pay the residue, they require an indemnity against the contingent claims of the tenants in case of eviction, and upon the refusal of J. E. to give such indemnity, he files a bill against them, for an account and payment of the residue.

Held, (reversing the judgment of the Court below,) that as J. E. had the power to disturb the leases, he was bound either to confirm them, or to give the indemnity required, and that the executor had a right to hold the residue till he obtained the confirmation or indemnity.—*Vernon v. Lord Egmont* - - - - - p. 554

**EXECUTRIX.** *Vide* WILL, 1.

**FAMILY COMPACT.** *Vide* AGREEMENT.

**FRAUD.** *Vide* SOLICITOR AND CLIENT. PRACTICE, 5.

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**LACHES.** *Vide* LUNACY.

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**LAY IMPROPRIATOR.** *Vide* TITHES, 2.

**LEASE.** *Vide* EXECUTOR, SOLICITOR AND CLIENT.

**LEGACY.** *Vide* WILL, 2.

G. H., by a testamentary paper, in the form of a regular will, naming executors, and bequeathing the residue, bequeaths "to his wife 500*l.* sterling per annum, for her "life, to be placed in, and payable out of the long annuities, to stand in her name, and &c. (trustees), and at her "decease, to my father, T. H., for life, remainder to my "cousin, R. H., son of my uncle, absolutely," &c.

By a second testamentary paper, dated four months after the first, and beginning in the regular form of a will but not naming executors, nor bequeathing the residue, the testator gives "to his wife so much money as will purchase "500*l.* sterling per annum, in the long annuities granted

“ by government, the income thereof to be received by  
 “ her during her life, for her own use, and at her death  
 “ to my child or children, for their own use and benefit,  
 “ equally ; in default of issue, then to my father, T. H.,  
 “ for his life, and at his death to go to my cousin, R. H.,  
 “ absolutely,” the principal to be in the name of &c.,  
 (wife and trustees).

Each of the testamentary papers contained gifts of a great number of legacies, and in a large majority of the bequests they were precisely in similar terms. In the case of two of the legacies given by the second will, the testator expresses that they are to be “ in lieu of any other annuity “ he may have granted to those legatees.” This precaution is omitted in the case of the legacy to the wife, with remainder, &c. The two papers were proved in the Ecclesiastical Court as one will.

Held in the Court below, without doubt that the second legacy was a substitution for the first. Held on appeal, that it was a case of great doubt and difficulty, but the judgment was affirmed. *Heming v. Clutterbuck* - p. 479

LEGATEE. *Vide* EXECUTOR.

LUNACY.

A., having granted to B. a lease with a covenant for payment of the rent of 90*l.*, and a clause giving a right of surrender to the tenant, dies, leaving C. his heir at law, who becomes seized of the lands subject to the lease. D., a near relative of C., having by some means acquired or assumed a title, by indentures dated in 1791, demises the lands to L. In 1793, C. is, by inquisition, found to have been a lunatic from 1786. In 1797 upon a rental and account filed by the committee of the lunatic, L. is returned as the tenant, and a sum of money is stated to have been received, and a sum of money to be due from him as rent. In 1802 D. is returned as tenant of the lands by the receiver appointed in the lunacy. In 1811 an order is made in the lunacy, that 720*l.* being due from D. as tenant, a distress should be levied on the lands. In 1817 the receiver died indebted to the estate, and his sureties were discharged from their recognizance, on payment of part of their debt by way of compromise.

In 1820 an ejectment was brought against D., to recover the lands for non-payment of rent, and a verdict and judgment obtained. In 1821 an action is brought, upon

the covenant in the original lease, against the Appellant, as personal representative of B., to recover 2,340*l.*, being 26 years arrears of rent, to which action the Defendant pleaded a surrender, eviction, &c., upon which a verdict is found for the Plaintiff, and judgment entered. In 1822 a bill is filed by the Defendant in the action, stating a case of laches, and of fraud and collusion between D., the relative of the lunatic and his committees and receivers, and praying an account against the committees and receivers, (not being parties to the suit,) or if from lapse of time such account could not be taken, then a perpetual injunction against proceeding on the judgment. The bill was dismissed with costs, upon the hearing in the Court below, and that decree upon appeal affirmed, with costs. *Lopdell v. Creagh* - - - - p. 260

MISDIRECTION. *Vide* PRACTICE, 3.

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PLEADING. *Vide* PRACTICE, 1. 3. SIMONY. TITHES, 1. WILL, 1.

1. The members of a corporation having filed an original bill in their individual names, but stating their corporate character upon an abatement of their suit, file a bill of revivor in their corporate name only. A demurrer for want of privity between the Plaintiffs, in the original bill and the bill of revivor, was overruled in the Court below, and on appeal.—*Walker and others v. The Warden and Fellows of Christ College, &c.* - - - - 9
2. Where a libel had been published, and the person libelled elected to seek his remedy by action for damages, and to the declaration in such action, the Defendant pleaded as a justification the truth of the facts constituting the libel, and filed against the Plaintiff in the action a bill, stating that the transactions in question took place in a distant colony, and that the witnesses to the facts were not in England; and praying a commission to examine those

witnesses—and a discovery from the Defendant, and an injunction to stay proceedings in the action until the return of the commission: held, upon a demurrer to the bill in the Court below, and upon appeal, that the Plaintiff in Equity was entitled to the commission and the injunction. But as to the discovery, the Plaintiff having in his bill charged and interrogated upon facts, impeaching the character of the Defendant in equity, and facts which might subject him to criminal proceedings; whether such Defendant is bound to answer any interrogatory which indirectly tends to establish the charge, or any interrogatory affecting him with moral turpitude, or degradation of character, *quære*.

Such a bill is not sustainable where it appears that the evidence is not material to prove the case at law. The bill ought, therefore, to shew what are the pleas at law. But if it refers to them so as to make them part of the bill, it is sufficient.

To support such a bill it is not necessary to allege that the witnesses were residing in England at the time of the publication of the libel, or have since left it.—*Macanley v. Shackell and others* - - - - - p. 96

3. By an act of Parliament for the improvement of the City of Dublin, reciting that the cleansing of the streets before an Act passed in 1784, had been managed by the Corporation of Dublin, and the expense defrayed by them out of the tolls and customs of the city; and that since 1784 the corporation had paid to certain intended commissioners the sum of 2,000*l.* yearly out of the revenue arising from the tolls and customs of the city.

The Corporation, according to the Act, paid the 2,000*l.* annually until 1818, after which the payment being in arrear, the commissioners by their secretary under the authority of the Act, in Easter Term, 1819, brought an action against the treasurer of the Corporation to recover 2,000*l.*, being one year's instalment. After appearance the Corporation represented that the tolls and customs were insufficient to pay any part of the 2,000*l.*, and proposed that the action should be stayed without prejudice to other proceedings. To this proposal the commissioners acceded, and the action was discontinued.

In 1821 the commissioners brought another action to recover

arrears, among which, by the fourth count in the declaration, 6,000*l.* were claimed as due on account of the arrears, for three years' payment for cleansing the streets, to which the Defendants pleaded that during the three years in the count mentioned, no revenue had arisen to the corporation out of the tolls and customs, whereout the corporation could have paid to the commissioners, &c. In consequence of this plea the commissioners, in the name of their secretary, filed a bill in Chancery against the Defendant in the action, stating the facts above-mentioned, and charging that the tolls were not deficient, and setting forth the particulars of various tolls and customs claimed and received by the corporation; that before and since 1784, the corporation had let the tolls, or some part of them upon leases at large rents; and that since the year 1784, the corporation had received in tolls every year beyond the sum paid to the commissioners a surplus annually of 2,000*l.* at the least. Upon these statements, with interrogatories founded upon them, the bill prayed in aid of the action—a discovery and account of the revenue arising from tolls and customs, and of the leases granted and the rents received and paid upon the same.

To this bill the Defendant demurred:—1st, as to so much as sought a discovery and account of the surplus of revenue received by the corporation in every year since 1784, beyond the sum paid to the commissioners; the cause assigned was that such surplus was not liable to the payment of the arrears of future years; the second demurrer was to so much of the bill as sought a discovery of the leases of tolls and customs granted by the corporation since 1784, and not subsisting since 1818; the ground of this demurrer was that the arrears had been paid up to 1818, and that the surplus of tolls before 1818 could not be applicable to the payment of arrears accruing after 1818.

The Defendant also put in a long answer, in which he admitted that the corporation and their lessees, both before and since the year 1784, had demanded and received tolls on various articles, and that payments had been, and were made upon ships entering the harbour, and ferries; but contended that such payments were not liable under the Act to the payment of the 2,000*l.*; and he set forth account

in schedules of tolls and customs, and payments made for ships and ferries since 1818; insisting that since that time there had been no surplus monies received upon tolls and customs, after defraying the expense of collection.

Held, (affirming the judgment of the Court below,) that the demurrers should be overruled.

The reasons for the judgment on the appeal were: first, because the demurrers were overruled by the answer; and, secondly, because, even admitting that the surplus of former years was not applicable to the payment of arrears of future years, the discovery of the revenues actually received in such years might be material to furnish presumptive evidence upon the trial of the action.—*Archer v. Little* - - - - - p. 272

4. Under the penal statute, 9 Anne, c. 14, enacting penalties against gambling, and giving half the penalty to the poor of the parish in which the offence is committed, a declaration, stating that W., at the parish of St. J., in the county of M., at one sitting, by playing at, &c., lost to T. 25*l.*, and then and there paid the same to T., is sufficiently certain. 1. (Semb.) As to the allegation of the parish, although it appeared *aliunde*, that there was another parish of St. J. in the county of M., and at all events such objection, if sustained, should be taken before, and is bad after, verdict, and the parish entitled under the act may recover half the penalty from the plaintiff. 2. From the allegation that "W. by playing lost to T.," it is a necessary implication, that W. was playing with T., in a case where the statement of facts excludes the supposition of a loss by betting.

If, in the assignment of errors, it is alleged, that it appears by public Acts of Parliament that there are two parishes of St. J. in the county of M., the plea of *in nullo est erratum* is not an admission of the truth of the allegation.—*Taylor v. Willans* - - - - - 415

POWER. *Vide* EXECUTOR.

PRACTICE. *Vide* PLEADING. CHARITY, 1, 2. TITHES, 1. APPEAL. WILL, 1. EQUITY. ACCOUNT. EVIDENCE. FRAUD.

1. The defendant in an action having died intestate, after interlocutory judgment and a writ of inquest of damages executed; but, before it was returned, the plaintiff de-

clared, in *scire facias* against the administrator, who pleaded *plene administravit*, and set forth in his pleas divers specialties due and owing from the intestate, and charging the estate. The plaintiff having replied, admitting the truth of the pleas, and praying judgment and execution of the goods of the intestate *quando acciderint*, entered up final judgment "to have execution against the defendant as administrator, according to the force, form and effect of the said recovery," no recovery having been before stated in any part of the proceedings on the record, and no final judgment having been given in the original action, and no provision being made by the judgment for the payment of the specialty debts. Held, that the judgment was erroneous, and it was reversed, with costs.—*Poulett v. Wightman* - - - p. 138

2. After an appeal against a decree of a Court of Equity had been presented to the House of Lords, and the cases printed with an appendix of evidence, as entered in the Register's notes of the proofs read on the hearing, an order was made upon motion in the Court below, expunging part of the evidence as entered by mistake. This order was reversed as irregular. In such case the proper course is to apply to the House, by petition, for leave to proceed in the Court below to rectify the mistake.—*Lopdell v. Creagh* - - - - - 255
3. *T.* from time to time during his life prepared instructions for his will, and causes drafts to be prepared upon those instructions. At his death he leaves various testamentary papers, executed so as to pass his property, under which papers his son, by a first wife, and the issue of that son : his widow, (a second wife,) his daughter, with her children, and ulterior remainder-men, might severally claim interests. By the last of these testamentary papers the provision for the widow and the daughter and her children was considerably increased. The testator died in 1813. In 1814, the daughter, with her husband and children, filed a bill in equity to establish the last will, and effectuate the charge in their favour. In the same year the widow filed a bill in the same Court to establish the same will and her interests under it. In 1816 the son and heir filed a bill in the same Court, impeaching the will as obtained by fraud

and the improper influence of the widow, and praying a declaration of its invalidity, and an issue at law to try the question.

In the first of these causes (the suit on behalf of the daughter and her children,) by a decretal order, an issue was directed to enquire, by a trial at bar, whether the last testamentary paper was the will of T. The widow, with her husband, were to be the plaintiffs in the action, the son and heir to be the defendant, and the daughter, with her husband, were to be at liberty to appear in the action and defend their rights and that of their children. Upon the trial of the issue the jury found a verdict for the defendant. In the course of the trial several of the testamentary instruments, executed by the testator, were produced in evidence, but the only point submitted to the consideration of the jury was the general question of the validity or the invalidity of the last testamentary paper. Application being made to the Court of Equity for a new trial upon the grounds—1. That the evidence given by two of the witnesses upon the former trial had been improperly admitted. 2. Of misdirection by the judge. 3. That the verdict was contrary to evidence; the Lord Chancellor having required of the judges who tried the issue, a report of only part of the evidence, the judges returned a report confined to the evidence of two witnesses; upon consideration of which the Court refused the application to set aside the verdict.

Against this decision there was an appeal to the House of Lords, who remitted the cause to the Court below, with directions to call for a full report of the notes of the judges upon the trial of the issue. In consequence of this remit, a full report having been required and returned, the application for a new trial was reconsidered, and thereupon a new trial was granted, and the issue was varied by adding to the original inquiry, "whether the testamentary paper (the subject of first issue,) was the last will of the testator;" a farther inquiry whether any and what paper writing is the last will of, &c. Against this new order the son and heir appealed to the House of Lords.

Held, that the variation of the issue not resting upon any allegation in the pleadings of any other testamentary in-

struments, but, that which was the subject of the first issue, was unauthorized; that the issue was defective in not directing a specific inquiry whether any part of the last testamentary paper, *e. g.* that under which the daughter and her children took interests, was valid, although the provision for the wife was void, which point ought to have been submitted to the jury by the judge at the trial, but was not so; that the order was erroneous in directing that the widow should be the plaintiff in the issue, leaving to the daughter, the plaintiff in the cause, in which it was directed, only liberty to appear and defend, &c.; that the order and issue were defective for want of parties taking interests under the several testamentary papers; that the issue ought to have been directed upon a decree in the three causes; and that, whether the new trial was granted or refused, no effective decree could be made in the cause in its actual state. Upon these and other grounds the cause was remitted to the Court below, with directions to enable the Court and parties to rectify the proceedings.

—*Trimlestown v. Lloyd* - - - - - p. 427

4. Upon immaterial issues it is not necessary that verdicts should be given. The jury may be discharged from giving such verdicts without consent of the parties.—

*Powell v. Sonnet* - - - - - 545

5. D. having filed, against M. and B., a bill in equity to cancel for want of consideration, certain *post obit* bonds, and a general bond which D. had executed and delivered to B. to secure the balance of account between M. and B., and future advances by B. to M.; and D. having afterwards dismissed the bill as against M., and examined him as a witness, it was decreed on appeal, reversing the judgment below, that D. having deliberately executed a deed, acknowledging that the bonds were given to secure certain sums actually advanced by B. to D., and a bond in a penalty, defeasible on payment of monies advanced, and to be advanced by B. to M., and accounts stated and settled between B. and M., and as no account could be taken in the cause between B. and M., who was no longer a party, D. had debarred himself from impeaching the securities, or the consideration stated in them. But on reference to the Master to take an account of what was

due from D. to B. on the securities, although it was directed that D. should be bound by the accounts stated and settled between M. and B., he was to be at liberty to falsify the same, or shew any errors or overcharges therein.

In proceeding under this decree upon the account in the Master's office, a book of accounts was produced, containing a general statement of accounts between M. and B., and a particular entry as to an alleged purchase by M. from B. of certain bonds executed by W. This entry appeared in the midst of the general account, upon two leaves, having an appearance of being inserted in the place of two which had been cut out, but which might have been brought into that state by continued use. Many of the items extending over a considerable period of time, were in the same ink and handwriting. Payments of prior date were entered after payments of subsequent date, and the account, as it appeared, laboured under other suspicious circumstances. There were also produced before the Master, by consent of all parties, plain copies, to save examined copies of the proceedings in a certain cause, in which one W. was Plaintiff, and M. and B., with others, Defendants; and in which cause it was found, upon the decree, (the same books and account having been produced in the cause,) that no money had been advanced or *bona fide* allowed by B. to M. on the bonds in question. Under these circumstances the Master disallowed the charge of B. against D., in respect of the alleged sale of W.'s bonds by B. to M., and his report to that effect was confirmed by the Court below. Held, on appeal, that under the circumstances, and the liberty given by the order to falsify the account, the order confirming the report was right.

Where a Master by his report certifies a fact, and exceptions are taken to the report, it lies upon those who are to uphold the report to produce the evidence of the fact. So if he certifies the result of an account upon the allowance or disallowance of items in dispute, and one of the parties excepts to the report, both as to the principle on which the account is taken, and the evidence in support of the allowance or disallowance of the items, the parties in

whose favour the report is made, must produce the evidence on the hearing of the exceptions.

Whether, upon leave "to surcharge and falsify," equities can be administered. *Quære*.

Whether such consent to admit copies of such proceedings, as before mentioned, precludes the party who consents, from objecting that the originals are not evidence, *Quære*. But if he permits them to be read before the Master and the Court, without efficiently raising a distinct objection upon this ground, although by his exception he objects to the report generally, as not supported by evidence, *semb.* that the Master acting upon the reference, with leave to "surcharge and falsify," may administer such equity as above mentioned, by disallowing the items to which such evidence applies.—*Bernal v. the Marquis of Donegal* - - - - - p. 594

**PRESUMPTION.** *Vide* EVIDENCE. LUNACY. PLEADING, 2. 3.

**REMAINDER-MAN.** *Vide* EXECUTOR.

**RESIGNATION BOND.** *Vide* SIMONY.

**SCIRE FACIAS.** *Vide* PRACTICE, 1.

**SIMONY:**

A bond recited that the patron of a rectory had, by an instrument of the same date, presented an incumbent, and that he had agreed to resign, upon request of the patron, or the owners of the advowson for the time being, for the purpose of enabling him or them to present one of the two younger brothers of the patron, when capable of holding.

Held, (reversing the judgment of the Court of King's Bench and Exchequer Chamber,) that such a bond is simoniacal and void, on the ground that such an agreement is a benefit to the patron, and contrary to the statute 31 Eliz. c. 6. and *semble* the common law.

Held also, that from the recitals of such a bond, it must be intended that such presentation was made in consideration of the agreement to resign, and that it is not necessary to allege that fact in pleading.—*Fletcher v. Lord Sondes*, p. 144.

**SOLICITOR AND CLIENT:**

In 1804, A., tenant for life under a settlement with a power to grant leases for twenty-one years, concurred with B.,

the next tenant for life, in an agreement to grant to the steward and solicitor of A. a lease of part of the lands, &c. in settlement for twenty-one years, absolute at a rent paid upon a valuation which omitted to estimate certain rights of common annexed to the lands, on the alleged ground that those rights were disputed by the copyholders of the manor. In 1809, B., having become tenant for life on the death of A., executed a lease according to the agreement.

In 1810, under an Act for inclosure of waste lands, a very large allotment of the waste was made, in respect of the lands leased, the rights of common having been admitted. B. died in 1816, when the reversion of the lands subject to the lease vested in C., who accepted the rent reserved till 1821, when he filed a bill to set aside the lease.

Held in the Court below, that the transaction was unimpeachable on the ground of fraud. On appeal, held that the relief was barred by acts of confirmation and acquiescence; but whether considering the facts and the relation of the parties the lease might not have been avoided, on the ground of fraud (or mistake) if the persons interested had questioned the lease recently after the transaction. *Quære; semb. affirm.—Lord Selwyl and others v. Rhoades* p. 1

STATUTE 52 GEO. 3. c. 101. *Vide* CHARITY, 1.

31 ELIZ. c. 6. *Vide* SIMONY.

OF FRAUDS. *Vide* AGREEMENT.

9 ANNE, c. 14. *Vide* PLEADING, 4.

SUBSTITUTION. *Vide* LEGACY.

TENANT FOR LIFE. *Vide* EXECUTOR.

TITHES:

1. In a suit for tithes by an impropriate rector against occupiers, where the Plaintiff by the answer is put to the proof of his title, it is sufficient: 1. As to personal ownership to prove that he is the beneficial owner of the tithes subject to terms vesting the legal estate in trustees, and creating charges on the rectory, but which charges being annual are satisfied up to the date of the suit. 2. As to general title, it is sufficient to prove a recent perception of tithes with occasional payment of composition, and leases of the tithes taken by the occupiers.—*Glegg v. Legh*, p. 302
2. A lay impropriator, who is in possession of a rectory, and in perception of the tithes subject to charges by way of

mortgage, and for raising portions, (inasmuch as such mortgagees, &c. having permitted the possession, cannot claim the by-gone rents,) has a title sufficient to sustain a suit against occupiers for an account of tithes.

Upon a bill filed by such a lay impropiator against an occupier, who had taken a lease from the rector of the tithes of corn and grain, but expressly without prejudice to any question as to the tithe of hay, and who, by his answer, set up but did not prove a modus as to the small tithes. Held, that proof of the perception of some tithes by a lay impropiator without evidence of a grant from the crown, gives a title to other tithes, of the perception of which there is no actual proof.

If the occupier shews a colour of title to the tithes not rendered, a Court of Equity will not interfere, but leave the Plaintiff to his remedy at law.—*Cherry v. Legh* p. 306

**TITLE.** *Vide* TITHES, 2.

**TRUST.** *Vide* CHARITY, 1. MORTGAGE. WILL, 2.

**WILL.** *Vide* PRACTICE, 3. CONSTRUCTION. DEED. TRUST.

**IMPLICATION. ELECTION.**

1. A. being possessed of a term in lands of ninety-nine years if she and B. and C. and D., her daughters by a deceased husband, should so long live, intermarries with E., whereupon a settlement is made of the property of A., including the term which is assigned in trust for A. and E., during their joint lives, with remainder to the survivor, his or her executors, &c. E. dies in the lifetime of A., by his will treating as his own the term of years in settlement, and bequeathing it to A. for life, remainder to B. for life, remainder to C. for life, remainder to D. for the residue of the term. He also by his will bequeaths the residue of his personal estate to A., and leaves her sole executrix. A. proves the will and administers to the estate, and dies, having made a will bequeathing all her personal estate to B., whom she appointed sole executrix; B. having married, X. proved the will; X., in the right of B., entered and held possession of the lands until her death, when he gave up the possession to Y., who took possession as in the right of C., whom he had married. But afterwards B. filed a bill against Y. and C., and also against D., stating that he was ignorant of the settlement when he gave up possession of the premises, and had lately dis-

covered its existence, and the right of B., his deceased wife and testatrix, under it, and praying restoration of the possession, and an account of rents received and payment of them, or an occupation rent during the wrongful possession.

By the answer to this bill the defendants relied upon the will of E. and the acceptance by A. of benefits under it, amounting to an election. They also filed a cross bill against X., stating the will of E.; and that A. being appointed executrix under it, had proved the will and acted under it, paying the debts and retaining a large residue, and praying that it might be declared that A. was bound to elect, and had elected, to waive her right to the term, and to take the benefit given to her by the will of X.; and that they were entitled to the residue of the term, according to the will of X.; but the cross bill did not make the personal representative of A. in that character, a party, nor pray any account of the personal estate of E., possessed by her. Under these circumstances it was held in the Court below and affirmed on appeal, that no election by A. had been proved in the cause, and that X., in right of his wife, was entitled to the possession of the term under the will of A., supposing the term to have passed by the words of her will.—*Morgan v. Edwards* - p. 401

2. H. R. being possessed of a leasehold estate, by a gratuitous deed, in 1731, limited the term to himself for life, with remainder to his son R. R., *quasi* in tail.

In 1739, upon the marriage of R. R., then an infant, a deed, to which he was a party, was executed, whereby the term, the subject of the former settlement, was limited in trust, to provide annuities to R. R. and his wife, till 1742, and, until that time and subject thereto, to permit H. R. to receive the rents, and then to raise 1,200*l.* for the use of H. R., and from 1742 to permit R. R. to receive the rents, subject to the charges and after the deaths of H. R., R. R., and H. R., in trust for the sons of the marriage, as R. R. should appoint, &c., with divers limitations over in trust to raise portions, &c.; and in case there should be no sons of the marriage, or by any future wife, &c.; that the term should revert to H. R., his executors, &c.; and H. R., by the deed covenanted to provide for R. R., his wife and children, board and

lodging until 1742, and at that time to pay R. R., his executors, &c., 300*l.* in money or stock, &c.

This deed was executed and acted upon by all the parties.

R. R. came of age in 1741, and died without issue male.

In 1743, H. R. made an appointment under a power in the deed of 1731. By his will also reciting and executing a power in the deed of 1731; and without noticing the limitation of the deed of 1739, he gave to his daughters A. and B., (under whom the appellants claimed) the residue of his personal estate.

Held, in the Court below and on appeal, that the term did not pass by the will of H. R., as part of the residue, but vested in R. R. by operation of the deed of 1731: or by operation of the deed of 1739, vested in H. R., subject to the trusts of the deed of 1731, in favour of R. R.

Held, also, that it was not a case of election, as R. R. had no power to reject the whole of the deed of 1739.—*Croker and others v. Martin and others* - - - p. 573



## INDEX TO APPENDIX.

### BURGH ROYAL :

1. An election of magistrates in a royal burgh, which takes place under a warrant from the crown, restoring the burgh, is an annual election within the meaning and provisions of the 2 Geo. 2. c. 16, s. 7. and 16 Geo. 2. c. 11. s. 22.

An action of reduction and declaratur at common law to set aside the proceedings may be competent, but it must be brought within the two months prescribed by the statutes.

An appeal will not lie for costs only where costs are in the discretion of the Court. But where the Court is directed by an act of parliament to give costs, it is a proper subject of appeal if they are not given according to the requisition of the act.—*Tod and others v. Tod and others* p. 639

2. In corporate bodies, the form of election is of the substance and essence of their constitution. Upon a petition to the Court of Session against the election of magistrates for a royal burgh; if it should appear that the proper form of election has not been observed, it is not competent to the judges to sustain the election, upon the ground that the result is the same as if the form had been observed. The constitution of a burgh in Scotland may be altered by a uniform usage of 40 years, *semb.*—*Gardner and others v. Reekie and others* - - - 644

### DEED, (construction of) :

A., by a trust disposition, directed trustees therein named, to lay out the residue of trust funds, therein specified, and “the interest and proceeds thereof,” in purchasing lands, which he thereby directed to be settled upon a certain series of heirs, named in a deed of tailzie, to which he referred, and afterwards by his will directed that the residue of his personal estate should be invested in government securities, which he gave, together with all the funds, &c., of which he should die possessed, to the same uses as before provided by the trust disposition.

The funds having remained uninvested, held, reversing the judgment of the Court below, that each successive heir, after the lapse of one year from the death of the testator,

is entitled to the official enjoyment of the interest and proceeds of the funds, until they are invested; and that the words do not import an intention that the interest and proceeds should accumulate for the benefit of the heir, who should happen to be entitled, at the time when the funds are invested, according to the trust.—*The Earl of Stair v. Macgill* - - - - - p. 662

#### MANDATE:

In a proceeding under the statute 7 Geo. 2. c. 16. s. 6, and 16 Geo. 2. c. 2. s. 24, a party having appeared as proxy for an elector at the annual election of magistrates and councillors of a borough, leaves Scotland in a ship of which he is master, upon a voyage to France and back, having before his departure communicated with his legal agent upon the subject of a petition to the Court of Session against the proceedings at the election, and during his absence, and before the expiration of two months from the election he transmits to the same agent a letter upon the subject. The agent thereupon presents the petition in the name of the proxy, and the proceeding is commenced before the expiration of the two months. The proxy does not return to Scotland until after the expiration of the two months, but then recognises the proceeding as instituted by his authority. Held, by the Court of Session, that there was not under these circumstances a sufficient mandator for the proceeding, and this judgment was affirmed on appeal, but with much hesitation.—*Arbuckle v. Innes and others*, p. 631

#### PURCHASER:

A., the wife of a bankrupt, her husband, being abroad, without the consent of her husband, or a legal ratification by herself, conveys to trustees under his sequestration, lands of which she was seized to her and her heirs. Upon a sale of these lands by public roup, the vendors undertake to execute a valid irredeemable disposition. Upon a suit by the vendors to enforce the payment of the purchase money, and a proceeding for suspension by the vendee: Held, on appeal, reversing the judgment below, that it is not such a title as a purchaser is bound to accept.—*Dick v. Donald* - - - - - p. 655











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